

104
**H.R. 1863: THE EMPLOYMENT NON-
DISCRIMINATION ACT**

Y 4. SM 1:104-87

H.R. 1863: The Employment Non-Discr...

HEARING

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT PROGRAMS

OF THE

**COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES**

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

WASHINGTON, DC, JULY 17, 1996

Printed for the use of the Committee on Small Business

Serial No. 104-87



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CONTENTS

Hearing held on July 17, 1996	Page 1
-------------------------------------	-----------

WITNESSES

WEDNESDAY, JULY 17, 1996

Alexander, Paula, Director, Human Resources, Eastman Gelatine Corporation	15
Birch, Elizabeth, Executive Director, Human Rights Campaign	41
Campbell, Hon. Tom, a Representative in Congress from the State of California	9
Cole, Brenda, Wainwright Bank & Trust Company	16
Dillon, Ernest, U.S. Postal Service, Detroit, Michigan	32
Dobson, Todd, Management Information Systems Director for Creative Office Interiors in Massachusetts	30
Duffy, Michael T., Massachusetts Commission Against Discrimination	43
Feldblum, Chai, Georgetown University Law Center	46
Frank, Hon. Barney, a Representative in Congress from the State of Massachusetts	11
McVeigh, Patrick, Franklin Research & Development Corporation	18
Miguel, Nan, Radiology Department, Seranga General Hospital in Grangeville, Idaho	27
Morella, Hon. Constance A., a Representative in Congress from the State of Maryland	5
Morley, Michael P., Senior Vice President and Director, Human Services, Eastman Kodak	14
Proto, Michael, U.S. Department of Justice	25
Solon, Karen, Child Development Center, Falls Church, Virginia	34
Studds, Hon. Gerry E., a Representative in Congress from the State of Massachusetts	6

APPENDIX

Opening statements:	
Torkildsen, Hon. Peter G.,	49
Blumenauer, Hon. Earl,	56
Jackson, Hon. Jesse L.	58
Kelly, Hon. Sue	62
Millender-McDonald, Hon. Juanita	63
Prepared statements:	
Alexander, Paula,	65
Birch, Elizabeth	71
Campbell, Hon. Tom	76
Cole, Brenda	77
Dillon, Ernest	79
Dobson, Todd	83
Duffy, Michael T., with attachments	86
Feldblum, Chai	128
McVeigh, Patrick	154
Miguel, Nan	157
Morella, Hon. Constance A.	161
Morley, Michael P.	65
Proto, Michael	163
Solon, Karen	166

Prepared statements—Continued

Studds, Hon. Gerry E.	170
Additional material:	
Dana Priesing, GenderPAC, with attachments	175
Charles K. Gifford, Bank of Boston	277
American Civil Liberties Union	280
The American Jewish Committee	290
Work/Family Directions	293

H.R. 1863: THE EMPLOYMENT NON-DISCRIMINATION ACT

WEDNESDAY, JULY 17, 1996

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON GOVERNMENT PROGRAMS,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10 a.m., in room 2367, Rayburn House Office Building, Hon. Peter G. Torkildsen (Chairman of the Subcommittee) presiding.

Chairman TORKILDSEN. The Subcommittee will come to order.

It is a pleasure, as Chairman of the Small Business Subcommittee on Government Programs, to welcome our witnesses and guests to today's hearing. Today's hearing is on H.R. 1863, the Employment Non-Discrimination Act, also known as ENDA. It was introduced by our colleague Gerry Studds and 118 other Members of Congress.

I am pleased that three of our colleagues are testifying before the Subcommittee this morning, and I applaud their leadership on this issue.

Our witnesses today are comprised of people with a very real experience and a professional expertise in the area of workplace anti-discrimination efforts. For the record, it is noted that several individuals opposed to this legislation were also invited to testify, but for various reasons did not choose, or were not able to do so.

A representative of the Small Business Survival Committee had looked forward to testifying on the bill, but could not.

Chairman TORKILDSEN. The Subcommittee also invited a representative of the Family Research Council to testify. The FRC had accepted the Subcommittee's invitation; until yesterday, the Subcommittee was expecting a representative to testify in person. Late last week, the FRC requested that two other individuals be allowed to testify in opposition to the bill. Both individuals were invited; one did not respond to the invitation and the other stated he is not able to be here today, but that he might submit a statement for the record.

Chairman TORKILDSEN. Yesterday, the FRC notified the Subcommittee that they would not send a representative to testify.

Today, though, we have many witnesses looking forward to testifying about this important legislation.

The Employment Non-Discrimination Act is a bill that deserves our attention because it represents a reasoned approach to an unreasonable problem facing all Americans. Discrimination in the

workplace, even if it isn't targeted at all Americans, absolutely harms all Americans.

Every year, Americans suffer discrimination on the basis of their sexual orientation. They are harassed, demoted, fired, and in some extreme cases, physically abused in their places of work — not because they are poor employees, but simply because they are perceived to be, or are, gay.

Five Americans will tell their stories of discrimination to the Subcommittee today. They represent a cross-section of America, but they have one thing in common: They have suffered the indignities of discrimination and the devastation of losing their jobs for reasons that have nothing to do with their job performance.

The Republican Party's core beliefs include personal freedom and equal opportunity. Nowhere is this more important than in the marketplace and the workplace. Discrimination is anathema to personal freedom, and it impedes equal opportunity.

The Subcommittee was struck by the number of Americans who don't realize that there is absolutely no legal protection for gays and lesbians in the workplace. Eight out of 10 believe that "some Federal law" or the Constitution protects these workers, but in reality they do not.

Americans have a basic sense of fairness when it comes to workplace issues. According to two recent national polls, Americans support equal — not special — rights for gays and lesbians in the workplace.

When reviewing this legislation, it is important to look at it from more than one perspective; first, in the immediate impact of providing a stable, healthy, and productive work environment for employees. Recognizing this, numerous companies across the United States have already adopted their own antidiscrimination policies. These companies include small businesses, colleges and universities, and Fortune 500 companies. Unfortunately, this is a fraction of the 6.8 million private and public workplaces in America.

Second, the long-term impact of discrimination has the potential of impeding our Nation's progress in the 21st century global marketplace. Employers will only hurt themselves by not pulling from the most talented applicant pool and providing those employees with tolerant work environments.

While discussing what ENDA is, a direct way to give Americans equal job protection in the workplace, it is also important to discuss what it is not.

ENDA is not a law that requires, or even allows, quotas or special preferences. The legislation, as drafted, specifically prohibits quotas.

ENDA is not a law that would require religious organizations to follow it, as religious organization would be exempt, as would very small businesses, those with 15 or fewer employees.

In recent years, I have met with many constituents who conveyed to me their personal fears and frustrations regarding workplace discrimination. It is for those constituents that I hold this hearing today. This is an issue of basic fairness. It is my hope that the testimony given here today will constructively contribute to the national debate and lead to a better understanding of this issue.

With that, I yield to my colleague, the Ranking Minority Member of the Subcommittee, Mr. Poshard, for any opening statement he may wish to make.

Mr. POSHARD. Thank you, Mr. Chairman.

First of all, let me thank you for holding this hearing. I have to be honest with you, I have been dreading this hearing. I know for many people this is a simple question of dealing with discrimination in the workplace, as it ought to be, but for others, like myself, who were born and raised in very traditional faiths — I am a Southern Baptist, and I would expect that quite a bit of the opposition to this bill will come from people of those faiths who see this as more than just an issue of discrimination.

It is not a simple matter at all. I want to share that with you in some ways, if I may.

I am not homophobic. I decry the kind of self-righteous judgment that went on the floor last week in this House against members of the gay community. As a Christian, I don't believe that that perhaps is the character of Christ at all, what happened in those discussions.

But I have a concern. I struggle with a faith that teaches me that the homosexual life-style is essentially unacceptable and a faith that teaches me at the same time to do justice, to love mercy, to walk humbly with my God and to love other people unconditionally in the way that Christ loves me. I am taught that we are created as the object of God's great, unconditional love, in fact, that is why we are created, and that we are to love one another — and I really believe that — a love that compels us not to condone the life-style but to do justice to our fellow human beings.

So, Mr. Chairman, forgive me for asking the question, but it is a question with which many people struggle, and I want to ask it; and I hope that we can clarify for this country in this hearing the answer to my question:

Are we condoning a life-style if we condemn discrimination against those that practice that life-style? That is what many people think we are doing. If we pass a law preventing discrimination against homosexuals in the workplace, does this mean then that we as a society give more legitimacy to the practice of the life-style? Does equal standing under the law mean equal standing in terms of the norms of what is acceptable in the society and the eyes of other people with respect to institutions of marriage and so on?

In my church and in my community, when this question is brought up to me, here is the way most often it is framed — and I don't mean this in any adversarial sense. Please don't take it that way; I am sharing an honest concern that the people who speak to me bring up to me.

I am a teacher. I pay a lot of attention to what goes on in the classrooms of this country. There are not too many people more important than those charged with our culture, history and values, to our children. Our parents are, of course, our most important teachers, but our school teachers rank very high in influencing our children.

Will the passage of a law such as this allow teachers, for instance, who happen to be homosexual, a greater comfort zone in advocating that the homosexual life-style is on an equal footing with

more traditional family structures when that life-style may conflict very directly and deeply with those whose children sit in the classroom? That is a question I had asked over and over to me again. It is an honest question.

So, Mr. Chairman, let me state the question again and let me state the fear again, because there are 100 propositions around here that rest upon our belief in this institution on the "slippery slope" theory, and we all know what that is; and I would hope that I would understand again — and I am not trying to be adversarial here, but the question again is this: If we pass a law preventing discrimination against homosexuals in the workplace, does this mean that we, as a society, give more legitimacy to the practice of the life-style itself?

I hope, as we go through this hearing and honestly try to discern the intent of the legislation, that we attempt to answer that question for Americans who have concerns about this. They are not people who want to condemn anybody; they feel caught in a vise, too, and so I hope we can address that concern.

Thank you.

Chairman TORKILDSEN. I thank the gentleman for his opening statement, and I thank him for posing questions in, I think, a very reasoned manner. I think no Member or no witness today should fear stating what is on their mind, or any Member should fear asking questions, because indeed that is the purpose of having a hearing; and I am very appreciative the gentleman came here, because don't think you are by any means the only Member of this Congress or the only American who is asking those very same questions. Clearly, I would hope that witnesses would address them because they are going to have to be dealt with head on.

I will just say very briefly that I don't think any law condones any life-style by saying that people in the workplace should be measured on how well they do their job. I think that is the essence the bill, but clearly that needs to be discussed more in depth; and I thank the gentleman for asking very tough questions and very important questions and bringing them in as part of the debate.

Now I would like to recognize I believe the newest Member of the Congress, Mr. Blumenauer, for an opening statement.

Mr. BLUMENAUER. Thank you, Mr. Chairman. I appreciate your courtesy and leadership in bringing this issue forward today.

I am the newest Member of Congress, and I think I am the latest cosponsor of the legislation before us today, so I did want to join in the hearing. I want to share my perspective briefly because I think I have voted on this bill — this concept — more times than any elected official in the country from more different levels.

I was privileged over 20 years ago, in 1973, to chair the first hearing before the Oregon legislature of antidiscrimination legislation, and it was an eye-opening experience for me to hear members of the community come forward, including an anguished person I had gone to high school with, telling me how important it was for him to be able to be judged as a person in the workplace.

In the course of the 20-odd years between 1973 and today, I have had an opportunity to be involved with this issue as a county commissioner, as a city councilperson, and now as a Member of the Congress. As a county commissioner and as a city councilperson we

promulgated antidiscrimination provisions that are very similar to what is found in this legislation. Five years ago, the Portland City Council adopted these provisions via ordinance, as a public workplace and for the general public. I am here to report to you, those 5 years have proceeded very positively.

The ordinance resulted in being able to answer questions in our community that these protections are not a special right, but just a requirement that we judge people on the basis of their job performance. It protects, ironically — and some people don't think of this — it protects gays and lesbians and heterosexuals from potential discrimination for their sexual orientation, or perceived sexual orientation. I can report to you, just having these provisions in place provides a context to settle the questions, and I am quite confident it has avoided problems in the workplace.

It has not been a burden administratively. As far as the city of Portland is concerned, it has made us a better workplace because we are more attractive to employees who know these provisions are in place.

I provided a brief statement for the hearing record, but I do want to report firsthand experience from my community. After 5 years, workplace protection has been successful; it has been positive. It hasn't given license to anybody, regardless of gender or sexual orientation, to inflict their views or unwanted advances on anybody. Very clear and well-crafted legislation can do that, and I am confident that what has been presented to us is that well-crafted presentation.

Thank you for your courtesy.

[Mr. Blumenauer's statement may be found in the appendix.]

Chairman TORKILDTSEN. I want to turn to our first panel who are Members of Congress whom we have invited to testify.

Mrs. Morella.

TESTIMONY OF THE HON. CONSTANCE A. MORELLA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mrs. MORELLA. Thank you very much, Mr. Chairman. I thank you and members of the Subcommittee for the opportunity to testify before your Subcommittee today in strong support of H.R. 1863, the Employment Non-Discrimination Act.

I am pleased to be one of the sponsors of this bill, along with Congressman Studds and Congressman Campbell and you, Mr. Chairman. I know that Congressman Campbell would have been one of the original cosponsors, as well, had he been in office when we introduced the bill.

Mr. Chairman, this bipartisan bill simply prohibits employment discrimination based on sexual orientation. It creates no special rights; rather it protects only the fundamental right to be judged on one's own merits. I never understand why there would be any inquiry about whether someone is homosexual, heterosexual, bisexual; I don't think that enters into how one performs one's responsibilities in the workplace.

The bill exempts religious organizations and businesses with fewer than 15 employees. It prohibits preferential treatment, doesn't require an employer to provide benefits to domestic part-

ners; it doesn't apply to the uniformed members of the Armed Forces.

It has been endorsed by a broad coalition that includes hundreds of civil rights leaders, religious leaders and labor and business leaders. Its supporters include Coretta Scott King and Barry Goldwater. Senator Goldwater has stated, "Job discrimination excludes qualified individuals, lowers work force productivity and eventually hurts us all. It is not just bad: it is also bad business." Indeed you have assembled a panel of business representatives who will be testifying to the fact that this legislation is good for American business.

I do want to point out that my own county, Montgomery County, Maryland, has had a much broader law in place since 1984, and it is one that prohibits discrimination based on sexual orientation in employment, housing, public accommodations, and services; and it is working just fine.

I commend the candor that Congressman Poshard exemplified, and I thank him for honestly expressing his concerns, because I believe this bill is consistent with the tenets of every religion; it is simply saying, treat all of God's people the same way.

Today's bill is very narrowly drawn. It applies only to employment. Our country is founded on the basic tenet that individuals should be treated equally and have all the same opportunities to excel; and I believe that a Government that respects individual rights, that does not intrude into the private lives of individuals, is a Government that best represents our country's founding principles.

So, Mr. Chairman and members of the Subcommittee, I very much appreciate this opportunity to reaffirm my strong support for this important legislation. I commend you for holding the hearing. I am sorry that I can't stay for the remainder of it because I have another hearing that is going on at this time, but I do also want to commend you for assembling such an excellent group of witnesses, many of whom will be describing the very real discrimination that is appearing in the workplace across the country and the positive impact that this legislation will have on our businesses and on our Nation.

I thank you.

Chairman TORKILDSEN. Thank you very much, Mrs. Morella.

[Mrs. Morella's statement may be found in the appendix.]

Our next witness is Congressman Gerry Studds, the lead sponsor of this bill.

Congressman Studds.

TESTIMONY OF THE HON. GERRY E. STUDDS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. STUDDS. It is a special privilege to be here with my colleagues. May I just observe, initially, that I think in the last 20 minutes in some very important ways more genuineness has been said and shared in this room than we witnessed in 48 hours last week on the floor of the House, and in fact I wish this were the debate we had last week. This should have been the first thing we were discussing.

I want to commend you for holding this hearing. I want to say to my colleague from Illinois that I was so touched by what you said that I considered for a moment rushing up and embracing you. I thought, no, perhaps this isn't the time for that. But I want to thank you and express my respect and appreciation for what you said and, most particularly, for the way you said it, and I hope fervently you will be able to stay for some of the witnesses who will follow us. There are real people coming after Members of Congress, and you will hear real things.

This is the first time in a long time that I have felt comfortable being surrounded by Republicans, and it is altogether fitting, appropriate, and symbolic. As you quite rightly said in your own opening remarks, if one understands what the Republican Party historically has stood for, it is altogether appropriate that I be surrounded thereby.

Mr. Chairman, 13 months ago, you and I joined with Senators Jeffords, Kennedy, Chafee, and Congressmen Frank and Morella in introducing this bill. Today, it enjoys the support of 30 cosponsors in the Senate, and with the arrival of Mr. Blumenauer, 135 in the House, and the President has pledged to sign it into law.

I commend you for holding the hearing and cosponsoring the bill and I would like to thank the eight other members of this Subcommittee who have signed on as cosponsors of this legislation, Representatives Kelly, Jackson, Clayton, Meehan, Velázquez, Hilliard, Luther, and Congressman Blumenauer, as well.

Over the past three decades, the Congress has enacted a series of statutes to safeguard the fundamental rights of all Americans regardless of race, religion, gender, national origin, age or disability. This is a legacy to be cherished and celebrated. Yet as we look at how far we have come as a society, we see also how far we have still to go.

Discrimination persists even where forbidden by statute. As you will hear from a number of the witnesses this morning, there are millions of Americans who to this day have no legal protection from discrimination at all. Every day, lesbian, gay, and bisexual Americans — and others who are perceived to be — suffer job discrimination for which they have no legal recourse.

That is why we have introduced this bill. It is clear and direct. It confers no "special" rights or privileges. Rather, it affirms that workers are entitled to be judged on the strength of the work they do, and should not be deprived of their livelihood because of the prejudice of others.

This is a principle with which every American can identify. Millions came to these shores in search of opportunity — the opportunity to build a decent life through one's own hard work and ingenuity. I believe that when our fellow citizens learn how frequently lesbians and gay men are denied that chance, they will agree that something must be done. Indeed, as Mrs. Morella said, it is hard to understand how any fair-minded person could reach any other conclusion.

When, some 2 years ago, the House debated the President's proposal to lift the military ban on lesbians and gay men, a majority of our colleagues opposed the proposal on the grounds that military life is fundamentally different from life as most of us know it. In

their zeal to bolster this claim to uniqueness, some Members hastened to assure us that the exclusion of gay people from the special domain of military life did not mean that they should be subject to similar discrimination in civilian life. This bill takes them at their word — it protects civilian employees and exempts, among others, members of the Armed Forces. I hope that those of my colleagues who relied on that argument during the military debate will join us now in supporting the bill.

I am pleased, but not surprised, to see that the bill has gained the support of so many within the business community, from small, startup companies to Fortune 100 corporations. Hundreds of companies had already adopted nondiscrimination policies when our bill was still on the drawing board. The bill is about civil rights, and enlightened employers recognize and respond to that. But it is also about, as you yourself said, productivity — the productivity our country will need if it is to prosper in today's global economy. That is why such prominent business leaders as Warren Phillips, the former Chairman of Dow Jones & Company, have endorsed the bill. As Mr. Phillips testified before the Senate Labor Committee when Senator Kennedy and I first introduced the bill in 1994, and I quote, "It would be self-defeating for us, and American business generally, to limit the talent pool because of prejudice. Morally wrong, yes. But also poor business, for us and for the country."

I welcome the support of so many of my colleagues and the scores of business, labor, civil rights, and religious leaders who have endorsed this legislation. I am confident that the act will also continue to find broad support within the business community and among decent, hard-working Americans from all walks of life.

This bill will not be enacted by the 104th Congress, but it will become law. The history of the civil rights struggle in this country teaches us that such goals are not achieved quickly or easily. After all, the equality envisioned in the Constitution pertained originally only to white men of property. Women could not own property, and people of color were property. It was a century after President Lincoln signed the Emancipation Proclamation that President Johnson signed the Civil Rights Act of 1964. It is in memory of Lincoln's proclamation that I asked that this bill be designated H.R. 1863. It is a beginning, the beginning of a new page in what I believe to be the final chapter in the long history of the civil rights movement in this country.

Some will say, as they did during last week's floor debate on the "Defense of Marriage Act," that this is not a civil rights issue, that it is wrong for gay and lesbian Americans to claim kinship with the great struggle of African Americans for freedom and equality. One does not hear this principally from African Americans — indeed, from Coretta Scott King, to the Leadership Conference on Civil Rights, to the overwhelming majority of the Congressional Black Caucus, leaders of the African American community and other communities of color understand the profound continuities, as well as the obvious differences, between the ongoing campaign for racial equality and the struggle being waged by gay and lesbian Americans.

That struggle is far from over, but it has achieved a hard-won consensus among right-thinking Americans that racial discrimina-

tion is wrong, as slavery was before it. We have a long way to go before we achieve a similar degree of public understanding, but achieve it we will; and together we will write the last chapter in our Nation's long journey toward justice and equality for all.

May I end, Mr. Chairman, with a personal observation. I think I mentioned on the floor last week, in 1963 I marched with Martin Luther King in Washington, and I was approximately 100 yards from him when he gave his remarkable "I Have a Dream" speech at the Lincoln Memorial.

In 1964, as a young staffer, I was on the floor of the Senate when the filibuster was broken against the Civil Rights Act of 1964. In 1965, I marched the last 2 days from Selma to Montgomery with Dr. King.

About 14 years after that, in 1979, I was a fourth-term Member of Congress, and I did not dare join the first march for gay and lesbian civil rights in this country's history in the city. I said, as you may have heard, that I thought I was exceptionally brave; I altered my jogging path that day so I could come within sight of the march. The next two marches, in 1987 and the 1990's, I marched, Mr. Chairman, and I spoke to hundreds of thousands of people here.

You referred in your statement to the poll that some 85 percent of Americans believe that it is wrong to discriminate, that people ought to be judged for the quality of their work. An equally astounding figure: The polls tell us that 80 percent of Americans don't know that such discrimination is legal. Those two numbers tell us a great deal.

As I was saying to Mrs. Morella, with 85 percent of the people in favor of this proposition, when we reach 95 percent, perhaps we will summon our courage and do what most of the folks would have had us do a long time ago.

Again, I salute you and Congressman Poshard for the extraordinary goodwill and genuineness of his statement and I look forward with enormous anticipation. Hopefully, I myself will live long enough to see this become law. You, Mr. Chairman, look young enough; I can almost predict with confidence that you will.

[Mr. Studds' statement may be found in the appendix.]

Chairman TORKILSEN. Let's hope we all live to see the day. Thank you for your testimony.

I would like to call on Congressman Campbell for your testimony.

TESTIMONY OF THE HON. TOM CAMPBELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. CAMPBELL. Thank you, Mr. Chairman. I am honored to be with my colleagues, Congressman Studds and Congresswoman Morella. Congressman Studds' closing comments cause me to make just one observation, to depart from what I was going to say.

I have the privilege to serve on the International Relations Committee. I have recently been studying the new constitution of South Africa. There is a country that struggled with what was, practically, slavery. That is what it was, probably the last vestige of slavery publicly recognized in the world. As they came out of that apartheid regime, their new constitution outlaws discrimination on

orientation, along with discrimination on the basis of race. We can and should learn from the newest democracy.

The second point is prompted by the comments of my good friend and colleague and fellow native Illinoisan Congressman Poshard — I just had the good judgment to move to California.

Here is how I look at it. There are always laws against religious discrimination in employment. A teacher comes into a public school who might be a Muslim or a Jew or a Christian. It is quite unfair to assume that the presence of such a teacher automatically proselytizes for his or her faith. Indeed, the application of that judgment is unfair except in one wonderful sense: Suppose you are such a wonderful, good person that your students know that, and your students may somehow find out what your religion happens to be because it shines forth. That is not proselytization, but it is the experience that a student then has that a person of your particular faith gave to that student, a learning experience.

It would be against the law for a public school teacher to say in class, well, I am a born-again Christian and therefore I am going to use my position as a fifth grade-sixth grade teacher to proselytize for our Lord and Savior; but if it shows by reason of his or her actions, that is all to the good, it seems to me.

Now, you might say homosexuality is not immediately observable; well, neither is religion. Certain religions require special rules of dress and that possibly would be, but if you take the model of existing civil rights law, Title VII in particular, you should not fear that an end to discrimination will lead to what you and I would both consider impermissible proselytization. We have lived with that since 1964. That is the law, except, as I say, in the sense that we educate children to know that there are good, moral people who happen to have a faith different from ours, and in my judgment, good, moral people who happen to have an orientation different from mine. But if somebody uses the position to proselytize, it would be wrong.

I point this out as a practical answer to your concern. Ending discrimination does not lead to proselytization.

The last comment I necessarily when I was in Congress before, I had a conversation with a colleague, a member of my party from southern California, who is no longer in the Congress. He was criticizing me for sponsoring this legislation then. He said to me, what we really need, we need to have a law to protect white Lutheran heterosexual men like me. That was him saying it; I am quoting him.

I said, you are absolutely right. Now we have already taken care of discrimination against you for being white and we have taken care of discrimination against you for being Lutheran and male; what we need is to prevent discrimination against you for being heterosexual.

He inadvertently gave me a whale of a good argument. People who say, how about us, don't realize "us" is who is protected in this act; and maybe someday it won't be "us" versus "them" anymore, it will be Americans.

I have one technical point with which to conclude. I am really delighted to have met Professor Feldblum today. She will be testify-

ing later. She has told me that half of my prepared testimony is unnecessary. Professors do this to each other.

Nevertheless, I would like to submit for the record proposed additional language to section 4 of the bill. The reason is to nail down the arguments sometimes used against us, namely, that if you are against discrimination, you must be for quotas, because affirmative action must necessarily follow from the end of discrimination. Those are not logical statements, but we can add some certainty by additional language in the bill.

I would urge the Chair to consider my proposed additional language to section 4. My proposed additional language to section 6 — Professor Feldblum has convinced me is unnecessary.

Chairman TORKILDSEN. I thank the gentleman for his testimony. Without objection, the additional information will be included.

[The information may be found in the appendix.]

Chairman TORKILDSEN. Before we proceed to questions, I notice that Congressman Barney Frank is here.

Would you like to make a statement, Congressman Frank?

TESTIMONY OF THE HON. BARNEY FRANK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. FRANK. Briefly, Mr. Chairman, and thank you very much for holding this hearing. As many others, I am deeply appreciative.

I want to deal with one issue. Our colleague, in a reasonable way, using the hearing for the purposes it should be used for, raised the issue of approving life-styles or affirming life-styles. I would like to appeal to conservatives on this — not that there are a whole hell of a lot of them here now. I don't want to get you into more trouble than you are already in now, Sue, but you probably wouldn't qualify fully.

But the point is this: When people argue that if the Government bans discrimination against something, it is therefore giving it a stamp of approval, it seems to me to make an argument that conservatives, people who believe in limited Government, should profoundly oppose. Obviously, I don't regard approval of me as a terrible thing, so I would contest that on other grounds, but even for those who don't want to approve of me, there are people who find certain religions quite offensive. There are people who find a lot of things offensive. It should not be argued that there are only two choices, either something is illegal and prohibited and legally disaffirmed or that it is being approved.

I would think conservatives would want to argue for a level of Government on neutrality and others as well. We don't want a totalitarian approach where, if the Government says, can you do it, the Government says, people can't discriminate against you for doing it; and I would think if you have a legal right to do something, there ought to be some protection. Then the Government isn't approving it or disapproving it; it is giving the right of the individual.

I think conservatives are making a very big mistake saying, anytime we ban discrimination, we are somehow approving something. There are a lot of religions that are just the beneficiaries of protection. There are other things that are protected. I think we should be very clear that we reject what really seems to me to be a great

expansion in Government. If we were to say that whatever the Government protects against arbitrary discrimination is therefore being approved by the Government, we would be making a great mistake.

This last point — and it might have been covered by one of my colleagues. One of the things we get whenever we propose anti-discrimination legislation is the prediction of horrors. I remember when we debated, Mr. Chairman, the Equal Rights Amendment in Massachusetts in 1976; we had a referendum on it. People predicted, if that passed, you would marry a broomstick and teachers would not be allowed to wear pants. The arguments were preposterous. We have had it on the books in Massachusetts as a State amendment because we passed it in 1976. Frankly, most people don't know.

I would venture to say if you went and polled the majority populations — the heterosexual populations in those States which have gay rights laws, most of them would not know there was such a law, so little does it impinge on the day-to-day activities of most people. In other words, every time we do this, whether we are doing it to the Americans with Disabilities Act, or the Civil Rights Restoration Act or the original Civil Rights Act of 1964, any time you do any antidiscrimination legislation, you get predictions of terrible disruptions, almost all of which do not come true, because the fact is that antidiscrimination laws, as we know, are very difficult to enforce. People learn not to give their motives if they are going to do something discriminatory.

I would urge, one of the things we ought to do is look at the experience. It has been my impression that no business, university, municipality, or State that has adopted such a policy — maybe there are one or two exceptions — has had such disruptive experiences that they have repealed it. I think the overwhelming experience is, if people do this, it gives some people a level of comfort, it gives people protection in exceptional cases, and the rest of the world just doesn't remember that we did it at all, which is proof, I think, of how little disruptive it is.

Chairman TORKILDSEN. Thank you very much, Congressman Frank.

I will proceed and ask, do any members of the panel have any questions for our fellow colleagues?

If not, thank you for your testimony.

Excuse me. Mr. Poshard.

Mr. POSHARD. Thank you, Mr. Chairman.

Gerry, I just want to ask the question — I know you drafted the bill to be consistent with the title VII Civil Rights Act of 1964. I guess I have never quite understood, why the small business exception? If discrimination is discrimination is discrimination, why do we say it is OK for people who employ 15 people or less and it is not OK for everybody else? What was the reasoning behind that in the beginning, and what is the reasoning with it now?

Mr. STUDDS. You answered your own question with respect to this bill. We did try to track that statute as closely as we could and say, this is no different in its principal respects.

As to the original reasoning, I am surrounded not only by Republicans, but by attorneys, and I will defer. I assume it is to give a

certain amount of repose to those with small family businesses where people could be intruded upon.

Mr. FRANK. I would take two guesses. I wasn't here at the time. I think the number might not be 15 as much as 67, which is the vote it took to break a filibuster in the U.S. Senate in 1964 which — I think that was probably a — another may have been, and Tom Campbell may have a better sense than I might, but when you get into this, you do have this residual concern about interstate commerce, et cetera.

There was this question in '64 of public accommodations and other things, and I think to some extent they might have been trying to strengthen the argument, when you got to a certain number of employees, you were more likely to argue that you had an impact on interstate commerce than if it were very low.

But my guess was it was more a counsel of prudence in terms of getting the vote.

Mr. CAMPBELL. I can add a bit, and thank you for the suggestion. In the Civil Rights Act of 1964, the legislative history indicates a concern, as well, for the burden on small business; and so in addition to the two equally valid arguments about the need for closure and possibly interstate commerce, there is a straightforward concern which you see reflected in many bills where we impose burdens on larger businesses and exempt smaller ones. So, it is a small business concern as well.

Mr. POSHARD. I understand those differentiations with respect to environmental considerations and that sort of thing wherein it is more difficult for a small business to implement a \$200,000 environmental concern or something, but I guess I never understood the differentiation with respect to discrimination.

Mr. FRANK. I don't either. It is not the way I would vote.

But the other argument, based on the burden, is the transaction costs; there is the assumption that at some point after, you may be unfairly sued. I do have to say, the record here in antidiscrimination, of people being unfairly sued, is a good one. There was the question, if you are small enough, can you bear the burden of attorneys and other things? Obviously, it is not a reason not to do what you can for the people.

Mr. POSHARD. Thank you, Mr. Chairman.

Chairman TORKILDSEN. Thank you, Mr. Poshard.

Congressman Studts has asked to join the panel. Since he is not a member of the Subcommittee, it is necessary to ask for unanimous consent; and if there is no objection, Congressman Studts, you are welcome to join the panel.

I would like to thank Congressmen Campbell, Frank, and Morella.

I would like to recognize Congresswoman Sue Kelly, who I am sure would be very happy to report that indeed people do view her as conservative. I would like to recognize her for a statement, as she has requested to me.

Mrs. KELLY. Thank you very much, Mr. Chairman. I would like to commend you for holding this hearing and to express my support for H.R. 1863, the Employment Non-Discrimination Act.

Several companies that are located in the district I represent have already instituted voluntary policies similar to the one ENDA

would establish. One of these companies, Eastman Kodak, which has facilities located in my district, is represented here at the hearing today. I would like to welcome Eastman Kodak's representative, Mr. Michael Morley, as well as all the witnesses that are with us this morning.

Unfortunately, I have a number of other commitments this morning that are going to preclude me from spending a lot of time at this hearing; however, I did want to be put on record as being supportive of the Chairman's efforts and of the legislation that is being discussed. I also would like unanimous consent to put my full opening statement in the record.

Chairman TORKILDSEN. Without objection, so ordered.

[Mrs. Kelly's statement may be found in the appendix.]

Chairman TORKILDSEN. At this time, we would like to ask the business panel to come to the table.

Our first panel is comprised of individuals in the business community. I would like to introduce them all now. Michael Morley is the Senior Vice President and Director of Human Resources of the Eastman Kodak Company in Rochester, New York. With him is Paula Alexander, Director of Human Resources of the Eastman Gelatine Corporation in Peabody, Massachusetts.

Patrick McVeigh is Senior Vice President for Franklin Research & Development Corporation in Boston, Massachusetts; and Brenda Cole is a member of the Board of Directors for Wainwright Bank & Trust Company in Boston, Massachusetts.

Chairman TORKILDSEN. We welcome you all to today's hearing and, Mr. Morley, if we could start with you.

TESTIMONY OF MICHAEL P. MORLEY, SENIOR VICE PRESIDENT AND DIRECTOR, HUMAN SERVICES, EASTMAN KODAK

Mr. MORLEY. Mr. Chairman and members of the Subcommittee, first, I would like to thank you on behalf of our more than 90,000 employees for allowing us to come and testify this morning with regard to discrimination and our perspective on it, as it influences our work force and influences our ability to be competitive as we go forward.

I would also like to add, we are proud to be here. This is an opportunity that we really welcome. I would like to suggest to you, we are proud to participate in this testimony and feel it is important for us and other employees and employers across the country.

Paula Alexander is with us today. She is the Director of Human Resources in Peabody, Massachusetts, as you mentioned.

Mr. Chairman, as many of you know perhaps all of you know, I hope — Kodak is the world's leader in imaging. We pride ourselves on that. We recognize that we deal in a very global, diverse marketplace, and we recognize that there are at least two imperatives for us as we think about how to be competitive going forward into the future.

The first is that we have to provide products and services to our customers, our diverse customer base, on a worldwide, global basis. If we can't provide the best of what is available in the imaging industry, then we cannot be competitive. So, we recognize that we have to be the highest value provider of imaging products and services worldwide.

Second, we know that in order to do that, we have to have employees in our company who are the best that we can possibly have. We have to have an environment in our work force and our workplace that is inclusionary, that welcomes all, that helps everyone to be the best they can be.

So we believe that it is important to have the passage of bills like ENDA in order for us, as employers, to maintain that kind of quality and that kind of leading-edge position in terms of our employment base; and certainly at Kodak we believe that is important to our success going forward.

About 2½ years ago Kodak restated its vision and mission and, in addition, we established five values that we feel are fundamental to the operation of our business. Those values include respect for the dignity of the individual, credibility, integrity, trust, and continuous improvement and personal renewal. Those values really set a template for what we are here to talk about this morning.

How can we follow those five values if, in fact, we allow any form of discrimination in our workplace? We know that diversity, we know that non-discrimination is a business imperative for us as we go forward.

How can we be competitive if we don't take advantage of the diverse perspectives and views and talents that a wide variety of people can bring to our workplace? We cannot be competitive, from our perspective, unless we reflect the marketplace in which we do business, so how can we afford not to pay attention to diversity? And we really view it as a business imperative as we think about our business going forward.

We support the Employment Non-Discrimination Act and we encourage and will actively support the passage going forward, since we believe it is the right thing to do, and we believe it is important to our competitive success. Thank you.

Chairman TORKILDSEN. Thank you, Mr. Morley.

[Mr. Morley's statement may be found with Ms. Alexander's statement in the Appendix.]

Chairman TORKILDSEN. , welcome.

TESTIMONY OF PAULA ALEXANDER, DIRECTOR, HUMAN RESOURCES, EASTMAN GELATINE CORPORATION

Ms. ALEXANDER. Good morning, Mr. Chairman.

Fair treatment, as Mike has said, is important to the environment in the workplace. Employees want to feel they have a sense of inclusion where they feel wanted and appreciated. This sense of community is important to the workplace.

In 1992 the Lambda organization was officially recognized by Eastman Kodak Company. As you know, silence can be one of the major forms of discrimination. This organization has brought about awareness in education to the Eastman Kodak Company where their issues and concerns can be addressed. There have been several hundred workshops that Lambda has performed at the Eastman Kodak Company, and from this educational process and awareness, the company has decided to implement domestic partner policy in 1997, based on the educational process. We understand that employees in domestic partnerships have the same personal and family needs, and this helps to reinforce the Kodak val-

ues that Mike talked about, as well as Kodak's commitment to diversity.

As it is written, the Employment Non-Discrimination Act contains the same values already in our company's nondiscrimination policy and in the Nation's civil rights law. That is the belief that people should be treated fairly and in keeping with our country's founding values that people are created equal.

Presently, the civil rights law does not protect gays or lesbians. ENDA is a logical extension of the fundamental values of fairness; it is reasonable and it is the right thing to do.

In today's global marketplace, Kodak's business cannot afford to lose its edge; we cannot drive away talented and capable employees, and we have taken measures to see that this does not happen. As a successful American business and a corporate citizen, Eastman Kodak Company enthusiastically endorses this important piece of civil rights legislation.

Chairman TORKILDSEN. Thank you, Ms. Alexander.

[Ms. Alexander's statement may be found in the appendix.]

Chairman TORKILDSEN. Now we will hear from Ms. Cole.

TESTIMONY OF BRENDA COLE, WAINWRIGHT BANK & TRUST COMPANY

Ms. COLE. Thank you for inviting me here today to discuss my company's enthusiastic endorsement of the Employment Non-Discrimination Act.

As a small community-minded business, we at Wainwright Bank and Trust believe strongly that this legislation is in keeping with the values that have laid the foundation of our company's success. It is in line with the most up-to-date personnel practices followed by successful small businesses who know that in order to stay competitive we must deploy highly skilled professionals who are capable of working with all kinds of people in an increasingly diverse workplace and marketplace.

We currently employ 93 people at our headquarters and five branch offices in the Boston area. Deposits at our branches have grown by 300 percent in the last 3 years, with 70 percent of our new businesses referred to us by our existing customer base. In our first 7 years of operations, our total assets reached \$273 million, making Wainwright Bank the 14th largest commercial bank in the Boston area in terms of asset size. Wainwright's asset and market share continue to grow thanks in large part to our well considered approach to managing our most precious assets, our people.

Although the bank was founded in 1987, its commitment to diversity goes back two decades earlier when our chairman and co-founder, Robert Glassman, was a 24-year-old platoon leader in Vietnam. With soldiers who were Caucasian, African American, Latino, and Native American, his platoon represented the diversity of America.

That this diversity was not reflected in the corporate board rooms of America helped shape the philosophy on which the bank was founded. An inclusive, community-minded approach guides all aspects and functions of Wainwright Bank's operations and growth. Our management refers to it as our banking on values policy. We put our money where our mouth is. We finance affordable housing

for all types of families and underwrite community development in all types of neighborhoods. We contribute to organizations supporting women's rights and human rights and particularly those who show commitment to valuing human diversity.

More than \$50 million of our depositors' money has been committed to financing projects such as homeless shelters; food banks; housing for men, women, and children with AIDS; and also breast cancer research.

Our staff reflects the diversity of our community and our customer base. It includes African Americans, Asians, Latinos, Caucasians, men and women, straight and gay, all working in various departments throughout our organization. Half of the bank's offices are women; 50 percent of the board of directors are women and minorities.

Our gay and lesbian employees have been extremely valuable team members. About 11 percent of our employees are lesbian or gay; 12 of our 5 — excuse me, 2 of our 5 branches are managed by a gay man or a lesbian. A gay man also has the enormous job of managing our rapidly growing credit card department. These employees work extremely hard and have performed extremely well. They are admired by their colleagues and well liked by their customers. Management considers them to be a major asset to our company and would not dream of treating them differently than anyone else.

We have unleashed the full productivity of our employees by ensuring that everyone is treated fairly, valued equally, and judged based on their performance, nothing more or nothing less. It isn't just the business thing to do, it is the right thing to do.

Wainwright Bank also believes that passing the Employment Non-Discrimination Act is the right thing to do. This bill embodies principles that the vast majority of American business already comply with under the Civil Rights Act. There is nothing radical or even questionable about this legislation. It is clear, straightforward, and focused like a laser beam on an achievable object, which is equal treatment in the workplace for everyone. It places no burden on small businesses; it imposes no cost and dictates no quotas. In short, we agree with ENDA on both philosophical and practical grounds.

There are those who will disagree with us. They may rightfully ask why Congress should pass a bill telling business people how to run their businesses. As a business person myself, I am also weary of inappropriate Government intrusion in the marketplace, but I also know that without basic ground rules the marketplace could not function.

Government has an appropriate role to play in establishing a level playing field in the job market. Government has a responsibility to ensure that every American enjoys equal opportunity in the workplace, if not an equal guarantee of success. This principle is already well established in the law and accepted in the private sector.

In short, ENDA is in the finest tradition of good Government. It upholds the values that make this country work without imposing costly mandates that make our work harder. Passing ENDA is the right thing to do, and now is the right time to do it.

On behalf of Wainwright Bank, our directors, managers, employees, and customers, thank you for the opportunity to share Wainwright's views.

Chairman TORKILDSEN. Thank you very much for your testimony, Ms. Cole.

[Ms. Cole's statement may be found in the appendix.]

Chairman TORKILDSEN. We will hear from Mr. McVeigh.

TESTIMONY OF PATRICK McVEIGH, FRANKLIN RESEARCH & DEVELOPMENT CORPORATION

Mr. McVEIGH. Good morning.

My name is Patrick McVeigh, and I am Senior Vice President for Franklin Research and Development. We work on social and environmental issues facing corporations as well as the financial bottom line. For almost 20 years, Franklin Research has collected and observed data for thousands of companies on the trends and successes in employment policies and other social issues.

Thank you for the opportunity to testify today in support of ENDA. We strongly support this bill for these reasons: We believe that discrimination and harassment are wrong. Nondiscrimination policies make good business sense. Businesses with such policies are better positioned to benefit from the diversity of the American work force.

Hundreds of farsighted businesses have implemented nondiscrimination policies. Increasing numbers of large institutional shareholders are willing to file shareholders' resolutions asking for nondiscrimination policies. Nondiscrimination policies provide for a heightened sense of security for workers without imposing hiring goals, recruitment obligations, or other components of affirmative action programs. Last but not least, in our own experience, nondiscrimination policies significantly improve employee morale, employee loyalty, and productivity.

We support ENDA because we believe that harassment and discrimination do not belong in the workplace. At every level of the corporation, employees deserve to work in an environment where their dignity as human beings is respected and where they are evaluated, promoted, and rewarded solely upon their professional performance.

From my own experience as a manager at Franklin Research, I can testify that having a nondiscrimination policy significantly improves employee morale, loyalty, and productivity. Franklin's policy conveys that our employees' sexual orientation will not be considered a factor in hiring, promotions, or performance evaluations. They need not fear retribution simply for being gay or lesbian. Their lives and our business would be greatly diminished if the employees lived every day in fear of discrimination or harassment.

It would be unethical on Franklin's part to stand by as these employees suffer needlessly. It would be foolish from a business perspective because personal stress ultimately impairs job performance. That is why, in our view, companies that fail to offer real protection from discrimination and harassment are not just hurting their employees but hurting themselves and ultimately their shareholders as well. Discrimination can be a subtle but not insignificant labor cost.

Conversely, nondiscrimination makes good business sense. Congress should pass ENDA because a well enforced nondiscrimination law will have the net effect of discouraging the discriminatory behaviors that burden individuals, diminish moral and productivity, and give rise to costly grievances and lawsuits.

Hundreds of businesses have implemented nondiscrimination policies in recognition that equitable policies serve business interest. Firms from a cross section of industries, from Bethlehem Steel, to Harley Davidson, to Coca-Cola, impetus to adopt nondiscrimination policies that include sexual orientation has come from employees, human resource managers, officers, and board directors, consumers, and other stakeholders of the corporation.

Hundreds of employers now are also granting equal benefits for domestic partners, including several dozen prominent publicly traded companies like Coors, Charles Schwab, NYNEX, and the Time-Warner family.

In Franklin Research's view, the presence of a nondiscrimination policy is a signal that a company is in a better position to benefit fully from the diversity of the American work force. It sharpens the corporation's edge as it competes for the best talent. This will become even more important as younger generations of gay and lesbian and bisexual Americans are increasingly unwilling to conceal their identities as a condition of employment.

The gay community is paying unprecedented attention in the 1990's to corporate policies addressing their workplace concerns. The most farsighted businesses recognize they must be in a position to hire and retain the best talent. That means committing to a workplace environment in which harassment and discrimination are not tolerated. These are a few reasons why, as investors, Franklin Research looks more favorably upon these companies for inclusion in our clients' portfolios.

We find it notable and not surprising that a recent study commissioned by the California Public Employees Retirement System found that companies that are widely recognized for superior workplace practices had higher stock valuations.

Publicly traded corporations have started to hear from stockholders who are willing to file shareholder resolutions to advance equal rights for gay men and lesbians in the workplace, stockholders as diverse as the New York City Pension Fund, several orders of the Sisters of Mercy and ourselves.

When shareholders' resolutions calling for a nondiscrimination policy were voted on at Cracker Barrel-Old Country Stores, the restaurant chain that had fired 11 employees explicitly for being gay, the resolutions drew the support of large institutional investors like State of California, Connecticut, and New Jersey, the Dreyfus Funds, and TIAA/CREF.

There is another particularly timely benefit to American business from this bill. By strengthening the obligation of employers to treat workers fairly, the Employment Non-Discrimination Act will help to reduce the invasive sense of insecurity that workers are feeling in this era of reorganization and downsizing.

In the current climate, workers are looking for real signs that their hard work will be valued and rewarded. This is something that this bill can do without imposing any hiring goals, recruitment

obligations, or other components of affirmative action programs. In fact, the fairness and simplicity of this bill is one of the most compelling features.

Affirmative action is not mandated by this bill. It contains no reporting requirements. It imposes no regulations. It does not compel employers to grant spousal benefits. The Employment Non-Discrimination Act simply embodies the principle of nondiscrimination that already enjoys the wide support of the American people.

Americans have mixed feelings about homosexuality, but there is little confusion about where the public stands when it comes to job discrimination. In repeated surveys, Americans support laws protecting gay men and lesbians from discrimination in the workplace. Yet it is currently the situation in 41 States, in all but 200 or so cities and towns, it is still perfectly legal to fire someone simply because of their sexual orientation, as Cracker Barrel did.

Unfortunately, Cracker Barrel is not exceptional in this regard. Antigay harassment and discrimination in the workplace is widespread, as other witnesses before this Subcommittee have documented. The personal stories behind the statistics tell of a wide array of behavior, from insulting remarks to violent attacks, that would interfere with anyone's ability to perform their job comfortably and securely.

Also, it is worth noting that each year thousands of hate crimes against lesbian, gay, and bisexual Americans is reported. It would be naive to think that the perpetrators of these crimes do not bring their hateful attitudes into the workplace. While some business leaders have responded, most working Americans remain unprotected. There is an urgent need for congressional action.

In summary, Mr. Chairman, ENDA's legislation, if enacted, will benefit American business and all of their employees. Discrimination is unjust. It is contrary to the American values of fairness, equality, and a level playing field for all. It is costly and bad for business. Americans support the principle of nondiscrimination, and so should their Congress.

Thank you for allowing me speak today.

Chairman TORKILDSEN. Thank you very much, Mr. McVeigh, for your testimony.

[Mr. McVeigh's statement may be found in the appendix.]

Chairman TORKILDSEN. I thank all of the witnesses both for your company's foresight and willingness to establish these policies on your own and also for your willingness to testify today. I think because of the example that your employers have shown, it is easier for other companies to follow suit. It is also easier for public officials to say that indeed this is not some arcane or very foreign practice that we are proposing in ENDA, but indeed it is something that is in place in many workplaces in the country right now and it is working well. To move to what had to be a first time for you and perhaps some of you don't know this example. These policies may have predated when you became involved in that.

Could you talk a little about implementing these policies once your company decided to do so and how employees responded, any questions they have, that sort of thing. Could you talk a little bit about what it was like implementing this the first time and how it worked in each of your companies.

Mr. Morley.

Mr. MORLEY. Let me talk about implementation from a couple of standpoints, Mr. Chairman. First, if we think about recent change that we made at Kodak in terms of formation of the Lambda network, which is an employee network of gay and lesbian employees, certainly there were many concerns as we thought about the formation of that network.

What I would suggest to you is that the concerns that we had beforehand were largely unfounded. The concerns as the network was formed really did not come to the fore and we found that we anticipated negative reaction and controversial reaction that really did not happen. In fact, as the network was formed and came into the place I would suggest to you that it has formed a base for education and understanding that has been unprecedented at Kodak in this area.

From a personal standpoint I would say to you that my level of understanding and my level of involvement has changed significantly as a result of that network formation. I believe there are many other employees, including management and employees at all levels that would provide you with the same kind of information with regard to the formation of Lambda as a network.

The second specific I would point to is a change we made in our benefit plans that provides for the inclusion of domestic partners in virtually all of our benefit plans at the Eastman Kodak Company and that will be initiated effective in January 1997. Again, we felt this would be a controversial decision, would raise significant controversy among our employees and perhaps customers and others in the marketplace. That simply has not happened. Many people's reaction to these changes is one of it is the right thing to do; it makes sense; it makes business sense. So, our experience has been very different than what we might have expected before we went down this path.

Mr. POSHARD. Mr. Chairman, can I ask you to yield? I only have one question. It fits in with your question.

Chairman TORKILDSEN. I will gladly yield.

Mr. POSHARD. If the rest of you could just answer. What prompted you to initiate the policy to begin with? One of the refrains that I constantly hear from people is that this isn't needed. There is really nothing going on in the workplace to the extent that the gay community is articulating to the American public, and so on, so we don't need all of these laws carved out for special populations et cetera, et cetera. That is a real question that is being put forth all the time so could you tell me in answering the Chairman's question what prompted you to initiate the policy to begin with?

I know you say it is good business and therefore in developing the policy you gain from a larger pool of people with great skills, but was there something else there that you observed in your workplace that also out of a humanitarian gesture prompted you to develop the policy?

Chairman TORKILDSEN. Yes, Ms. Cole. Would you like to start?

Ms. COLE. I think that for Wainwright Bank one of the things that we experienced was that the chairman and the president of the bank had decided back 4 or 5 years ago that they were going to carve out a market niche for themselves that was built on social

justice and community reinvestment. They have a long-standing tradition of being involved in many projects connected with homelessness, and AIDS, housing and projects like that.

The chairman and the president, 3 years ago, made a decision to reach out further to another aspect of what they consider to be social justice and to engage in a dialogue with the gay and lesbian community in Boston and perhaps to talk to them about building partnerships, not necessarily giving handouts, but developing economic partnerships with the gay and lesbian community.

In doing so, they really have carved out further a niche for themselves in terms of social justice. The stories that came out of that opportunity that they had to interface with the gay and lesbian community in terms of discrimination that was felt where couples would go to try to get mortgages to buy homes, loans for small businesses were really shocking and it was the heterosexual white males that were interfacing with the gay and lesbian population as they would try to get the mortgages that would come back with these stories to the chairman and to the president.

At that point, they really started to study it further and the chairman approached the Massachusetts Bankers Association just to check things out a little bit further to see how deep-seated is the discrimination and to see if he could get domestic partnership benefits for his bank. It took him 3 years to lobby to get them to accept the idea of having same sex domestic partnership benefits offered to banks in the Massachusetts area.

Currently, as far as I know, we are the only bank that offers same sex domestic partnership benefits to its employees. So, the discrimination is there and the prejudice is there and we just experience it daily by anecdotal stories that we get from both customers, our employees and people who just want to share these things that happen.

Chairman TORKILDSEN. Would anyone else like to address that? Ms. Alexander or Mr. McVeigh or Mr. Morley?

Mr. MORLEY. The question of why did we do this and how did it happen? My reaction to that is it came from a variety of perspectives. One, it came from some of our employees. The formation of the network, for example, was really initiated by some employees coming forward saying they felt they really needed to have some kind of network to help support, educate and put forth better understanding of their situation.

We also really started to take a look at our marketplace and ask ourselves what do our customers look like? Who are our customers? Do they represent a diverse population across the United States as well as the rest of the world? And we came back and said, yes, they do. So, we said that we really need to initiate some of these activities for that reason.

Third, it may seem strange, I guess, in a corporate world of downsizing and restructuring and whatnot, but I can assure you that companies like Kodak are hiring people, and we begin to find that skilled workers are not easy to find. If you are going to exclude a portion of the work force as a result of your policies and practices, you are really going to do yourself a disservice.

The first comment I would make is it is interesting to me as we recruited people and tried to retain people in our work force, we

have had individuals who are not touched by this in any way who have come forward and said our position relative to this is important to them because it sends a message we really do respect every individual regardless of your sexual or religious orientation or whatever it might be.

People have said they understand our position on diversity and that is important to them, whether it has anything to do with sexual orientation or not. These are the reasons for going down this path.

Chairman TORKILDSEN. Mr. McVeigh.

Mr. McVEIGH. Maybe just to reiterate some of the comments already said to point out our experience at Franklin. We went down this road to adopt these policies really at the request of one of our employees. About 20 percent of our employees are gay and lesbian and they asked that we have such a policy and really what we were surprised by was what this did for the culture within the company, a sense of openness, acceptance by employees.

We heard more from the nongay and lesbian population of the company that this was an important stand to take and increased their respect for the management of the company and who we were as a firm. It has really been a very positive addition to our firm in telling employees that they are all valued within the firm.

Chairman TORKILDSEN. Thank you. Ms. Millender-McDonald.

Ms. MILLENDER-MCDONALD. This is one member who would like to commend all of you. Kudos to all of you. It shows that you are a progressive business, that you are sensitive to all the people who are perhaps your constituency, and I would like to further comment and commend you on your getting involved to the degree of getting the network that you have just talked about, the Lambda network that gave you a further awareness, Mr. Morley, of the people whom you represent in terms of your customers. So, it is, indeed, a pleasure and refreshing to see you and see you take this forward step. It was not only politically correct it was fundamentally correct and I do applaud you on that. Thank you, Mr. Chairman.

Chairman TORKILDSEN. Thank you. Any other questions from the panel? Mr. Bentsen.

Mr. BENTSEN. Thank you, Mr. Chairman. Thank you all for testifying. I apologize for being late. I did have a couple of questions. I would like to separate the philosophical issues apart from this and maybe I will ask Mr. McVeigh and read the testimony from Eastman Kodak. You just entered in, you are expanding your policy. It appears you just extended health benefits so you don't have any empirical data, but Mr. McVeigh, perhaps from your firm's review of companies that you invest your clients' funds in, have you seen any marked effect or cost associated with companies that have antidiscrimination clauses such as that we are discussing today? Is there some additional cost or mandate on business that has a fiscal impact?

Mr. McVEIGH. We have looked at it from the point of view, has there been any impact on a company's stock price and how investors have valued these companies, and to this point, we have found none. There has been a number of studies that have been done looking at companies that have such policies comparing them to the market as a whole, and these studies have indicated that these

firms have done better than the average company in the marketplace, but it is still a little bit early to draw too many conclusions from these studies.

But from everything we have looked at and what others have done, there is no empirical evidence that these companies would underperform in the marketplace.

Mr. BENTSEN. In terms of stock prices, is there any unfunded liability cost or any increase benefits cost? Do the analysts look at that as well?

Mr. McVEIGH. The studies that I am most familiar with aren't looking at the individual costs within a firm, which this bill isn't dealing with costs anyway, but it is looking strictly from a point of view of how stock prices of the companies, once they have adopted such policies in the marketplace versus companies that don't have similar policies.

Mr. BENTSEN. Any other comments? I don't know whether or not Eastman Kodak may have looked at this when you headed down this path or looked at other Fortune 500 companies that are doing this.

Mr. MORLEY. Well, certainly, we looked at cost implications of expanding our benefit program and we anticipate what that will be and we think we can make pretty good judgments around that, but we believe that additional costs is well-founded in terms of what we believe it will deliver to the success of the business, so we really have little concern over the additional cost that may be borne as a result of these changes in our benefit plans.

The only comment I would make around stock prices, I think the stock market really reflects the attitudes toward the health and the well-being of the corporation in total so that while they may not take into account specific costs as they relate to benefits, for example, they would certainly take a look at the overall well-being of the corporation and how well it is managed, what the future success of the corporation might be, so I think that certainly is included as a part of the stock price.

Mr. BENTSEN. I appreciate that, and Mr. Chairman, I think as it relates to the Small Business Committee that our focus should be primarily on the impact on business, what the impact is on a business' ability to earn revenues, what its expenditures and costs are and leave other questions, philosophical questions to other committees, but I think it is important that we explore and try to find the empirical data from a financial standpoint.

Mr. MORLEY. Mr. Chairman, I would like to add one additional comment to be sure that we understand that this legislation does not mandate anything in terms of benefit changes. That is something that Eastman Kodak has decided to do and that is the cost I was referencing, so I wouldn't want to have a misunderstanding that we believe this bill will cause any additional cost or administration or bureaucracy for large or small employers.

Mr. BENTSEN. I appreciate that clarification. Thank you, Mr. Chairman.

Chairman TORKILDSEN. Thank you. The gentleman from Texas. The gentleman from Massachusetts.

Mr. STUDDS. Both during and after our consideration of the marriage bill, the stock market took its biggest plunge.

Second, let me say very seriously I think this testimony is both enormously impressive and important. It also makes me very, very proud too of the city and State to which I am about to return. I wish that each of the Members of the House — well, almost each, were here to hear this. I think with a little bit of dialogue and the kind of openness and honesty we have seen here we can put that behind us and proceed. Thank you very much.

Chairman TORKILDSEN. Thank you. Are there any further questions for this panel? If not, I will just say to my colleagues from Massachusetts, yes, at some point I expect people will look back and say what was the big deal, but we are not there yet. Believe it or not, this is the first hearing ever for the House of Representatives on this subject. It took a while to get to the first one, but hopefully things will move quickly hereafter.

I would now like to ask the next panel to please come forward.

Our second panel is comprised of individuals who have real life experience with this subject. Michael Proto works for the U.S. Department of Justice. Nan Miquel works in the radiology department at Seranga General Hospital in Grangeville, Idaho. Todd Dobson is the Management Information Systems Director for Creative Office Interiors in Massachusetts; Ernest Dillon works for the U.S. Postal Service in Detroit, Michigan; and Karen Solon works in the Child Development Center in Falls Church, Virginia.

We welcome all of you today. I would like to start with Mr. Proto with your testimony.

TESTIMONY OF MICHAEL PROTO, U.S. DEPARTMENT OF JUSTICE

Mr. PROTO. Thank you, Mr. Chairman—

Chairman TORKILDSEN. Could I ask you, Mr. Proto, pull the microphone a little closer.

Mr. PROTO. Again, I want to just start with saying I am not here because I have a need for others, especially an employer, to know about my personal life, but it was an employer's inquiries into my personal life that disclosed information it would not otherwise have known, and I was apparently discriminated against because of it.

In truth, I would prefer to keep my personal life just that, personal. But this is an incredibly important issue and I hope I can help bring about an understanding of the need for the Employment Non-Discrimination Act.

I graduated with high honors from Quinnipiac College in Hamden, Connecticut, and worked for the international accounting firm, Ernst & Young, for 5 years. I passed the CPA exam in 1987. I was living a comfortable life at a very young age, but felt compelled to make a greater contribution to my community.

So I returned to school seeking a Master's degree in criminal justice administration at the University of New Haven where I have remained in excellent standing.

In 1994 I began the process of competing for the position of police officer with the Hamden, Connecticut, police department. After a battery of written exams, physical agility tests and oral interviews, I was informed that I earned the highest score on the civil service test and, overall ranked among the top seven candidates set to

start at Connecticut's police academy in April 1995. I received a written offer of employment.

As a condition of employment, I submitted to a polygraph test. During a series of personal questions on that test, all of which I answered truthfully, I disclosed the fact that I am gay.

A few weeks later, I realized that I had been passed over for the job when others in line to begin at the academy, including those who had not ranked as high as I had, received orders to report for duty.

I then received a letter from the town stating that I did not meet its standards. But, according to the standards established for the job, I was obviously qualified.

Upon my insistence, I met with the Chief of Police, who told me that an investigation of my background had, in some way, raised questions about my integrity. A follow-up letter from the town also indicated the background check may have been a problem. However, I have determined that a background check was never completed. Former employers have confirmed to me that they were not contacted, friends, neighbors and personal references were not contacted, there was no credit inquiry and so on. Interestingly, a thorough Federal investigation of my background for my current job appropriately adjudicated me.

As I said, I have gotten another job. I am grateful that my current employer recognized that abilities and talents are the appropriate considerations in a hiring decision. But, the fact that a job offer was revoked following a polygraph test creates suspicion. I have had to explain the incident over and over again, sacrificing my privacy, so that my reputation would not be in question.

I have never been provided with an explanation as to why my job offer was revoked. But, the fact is every piece of evidence I have gathered points to the real reason — discrimination; a type of discrimination which is, in fact, illegal in my State of Connecticut.

In a sworn statement, the Chief said he didn't know about disclosures on the polygraph test because it was conducted by the State police, not his department. But, when the State's Freedom of Information Commission ordered him to turn over the polygraph report the State police prepared for him, sure enough, what the very first paragraph said of me was, "he is gay." It is unbelievable to me that an entire police department's integrity and credibility may have been compromised simply to carry out discrimination against one person who just wanted to be of service.

The fact that I don't get intoxicated and have never once used any illegal substance were evidently less important to the polygraph examiner, because he included them much later in the report. When the Chief was ordered to turn over the psychological assessment I had undergone, I found it concluded that I was suitable for the job. In fact, psychological tests I have submitted to state that I have a "very superior" IQ, "the ability to reach high levels of professional competence in the public safety field," and that my abilities make me a "candidate for special units, such as hostage negotiating."

When the New Haven Register printed my story, it polled its readers with the question, "should gays be allowed to be police officers?" Every response printed the next day was positive, but one

stood out. A woman named Connie from Stratford, Connecticut, responded that it was a shame the town would be denied the services of a "potentially excellent" police officer because of discrimination. What Connie recognized was, this was not just about me. This was about the entire community and how it loses when one person's abilities are senselessly and discriminately set aside.

What we are talking about today is not just about any individual or a subset of our society, it is about the entire country, tapping into every available resource, regardless of who it comes from, and making it move.

I merely competed for a job that, by all objective standards, I was highly qualified for. But, apparently, because of discrimination, I have had to defend my character and reputation against an unwarranted attack. The only way I could have avoided this scenario would have been to not seek out the opportunity in the first place. Unfortunately, I think that happens a lot. That doesn't make this country move forward, it holds it still.

When my grandparents came here from their native Italy, they had nothing but the promise of opportunity. In exchange for that promise, they vowed to make a contribution to their new country. They indoctrinated me with the responsibility to carry on that vow, but I don't think they ever contemplated that one of their children or grandchildren would be denied the promise.

I ask this Subcommittee to please support this bill to send a clear message that America is still about moving forward and its promise is still within the reach of all its citizens. Thank you.

Chairman TORKILDSEN. Thank you, Mr. Proto.

[Mr. Proto's statement may be found in the appendix.]

Chairman TORKILDSEN. Now, we will hear from Ms. Miguel.

TESTIMONY OF NAN MIGUEL, RADIOLOGY DEPARTMENT, SERANGA GENERAL HOSPITAL IN GRANGEVILLE, IDAHO

Ms. MIGUEL. Chairman Torkildsen and members of the Subcommittee, thank you for having me here today. I am grateful for this opportunity to tell my story, but I must admit that I wish it weren't necessary. In my family, we were raised to live by the Golden Rule. We were taught to treat others as we would like to be treated ourselves. If everyone guided their behavior by that simple but profound idea, we wouldn't need laws like the Employment Non-Discrimination Act. Unfortunately, people don't always treat each other fairly. For that reason, there are millions of hard-working, taxpaying Americans who need the protection afforded by this bill.

Frankly, I was shocked to learn that no Federal law prohibits job discrimination on the basis of sexual orientation. Like most people, I assumed that the law protected everybody from this kind of discrimination. I learned the hard way that this just isn't so. Today, in the United States of America, you can do your job, do it well, play by the rules and still have your livelihood snatched away from you because of someone else's prejudice.

This doesn't just happen to our fellow Americans who are gay or lesbian. It also happened to me. I stood up to harassment and discrimination directed at a young woman in my workplace — and for that, I was also forced out of a job that I did well.

In 1988, I was recruited to manage the radiology department at a hospital in Pullman, Washington, just over the State line from my home in Moscow, Idaho. At first, we were extremely understaffed, to the point where I was often working alone, handling all the ultrasound work, performing all the mammograms and doing all the paperwork. I even slept in the hospital on call overnight. It was tough, but I loved the opportunity to help people. I got the opportunity to learn how to be a good manager.

Eventually, our staff grew to accommodate the workload, and I was able to concentrate more on quality assurance and developing new services. In 1993, I had the opportunity to hire an additional technologist. Among the job applicants was a bright young woman whom I will call M.J. She was registered in obstetrical and gynecological ultrasound, and had the kind of experience we needed to complement our staff. I asked my medical director, who was a physician with privileges at our hospital, to phone the doctors M.J. had listed as references. He reported that her references were good, so I invited her in for an interview, which went very well.

But almost immediately after M.J. left, the other technologists began snickering about her. They joked about how obvious it was that this woman was gay. As far as I was able to determine, they based this on the way she dressed and looked. I saw nothing unusual about her. She was intelligent, kind of quiet, and seemed eager for the job.

Before I even hired her, the medical director came to me for a little "heart to heart" conversation behind closed doors. He told me that some of the technologists thought M.J. was gay, and he didn't think that I should hire her. I told him it was nobody's business whether she was gay or not. As a manager, I believe that you can't make a decision on whether to hire or fire someone based on something like that. You have to put aside your personal prejudices and judge people based on their qualifications and job performance.

For those very reasons, I hired M.J. for the job. Soon thereafter, the medical director complained that the ultrasound department was quote "overstaffed." This, despite the fact that the department was well within the revenue goals outlined by the administration, and we were finally able to handle the workload that I had carried alone for so long.

The medical director never gave M.J. a break. He made it plain that he was irritated by her very presence even though she did her job, and did it well. He was exceedingly rude to her in front of other people. He refused to review her cases, or even write an evaluation of her performance so she could understand what he wanted of her.

M.J. tried to meet him halfway. She did her best to treat him the way she thought she ought to be treated. She asked me for my advice, and I suggested that she be sure to give him more space, always be polite no matter how rude he was, and to give precise patient histories whenever he asked. She did all that, and more. But it didn't make any difference. The medical director began a campaign to drive M.J. out of the hospital. He began to claim that she was incompetent. I disagreed with him, based on my experience in the field, but verified my opinion with another radiologist who knew her work. This radiologist said M.J. was performing her job

quite well and was diligent in serving the patients. M.J.'s job performance didn't matter to the doctor. He started shouting at her, and at me as well.

I wrote a letter to the hospital administration, describing the medical director's behavior. His harassment and abuse was disrupting our workplace, and I was afraid it would jeopardize the care of our patients. When I went in to discuss the problem with the assistant administrator, he said, "Don't you think he's just responding to the level of discord in your department?" I couldn't believe it. It was the doctor who was causing the discord. But here was M.J., a hard-working, quiet young woman who wanted nothing more than to do her job, being blamed for this man's unprofessional conduct.

As if it weren't clear enough, the reason for the doctor's displeasure with M.J. became crystal clear one day when she had the day off. The medical director bought ice cream for the staff, and when I asked him what the occasion was, he said they were celebrating because M.J. wasn't there. Then he added, "It's Gay Pride Week. She's probably off marching in a parade somewhere."

He obviously wasn't shy about making his prejudices known. He didn't care that his behavior disrupted our workplace and made life miserable for this hard-working young woman. I continued to have conversations with the hospital administrators, but they refused to place responsibility where it belonged, on the discrimination practiced by this physician.

Instead, they blamed me. I was called into a meeting to discuss the problems in my department. I was told that no progress had been made since I had first brought the situation to their attention. They said it would be easier to remove me than to remove the medical director. So, I was placed on a 3-month administrative leave.

Meanwhile, M.J.'s hours were reduced. She filed a grievance, seeking to return to full-time status. Instead, she was fired.

Then, 4 days after Christmas in 1994, the hospital administrator called me and said there was no longer a place for me at the hospital.

There is no documentation anywhere in my personnel file of any wrongdoing on my part. It seems clear to me that I lost my job because I refused to join in the discrimination aimed at a member of my staff.

You know what? I don't even know whether M.J. was gay or not. I never asked her. It doesn't matter to me. She was a quiet, hard-working woman who simply wanted to do her job and live her life in peace. She ought to have a right to do that, whether she is gay or lesbian or heterosexual. Those things just shouldn't matter in the workplace.

Since this terrible experience, M.J. has moved to another State and tried to pull her life back together. I have moved on with my career, but some of my old friends at the hospital are afraid to be seen with me, because they have to continue to work with that medical director. He caused the problem, but he kept his job.

For me, this was a frustrating and disheartening episode. This kind of discrimination violates the Golden Rule that I was raised to live by, and it undermines the values that we as a country ought

to be governed by. I would simply ask the Subcommittee to help put things right and pass a law against this kind of discrimination.

Thank you very much.

[Mr. Miguel's statement may be found in the appendix.]

Chairman TORKILDSEN. Thank you very much for your testimony, Ms. Miguel.

Now, we will hear from Mr. Dobson.

TESTIMONY OF TODD DOBSON, MANAGEMENT INFORMATION SYSTEMS DIRECTOR FOR CREATIVE OFFICE INTERIORS IN MASSACHUSETTS

Mr. DOBSON. Mr. Chairman and members of the Subcommittee, thank you for inviting me here today. I would also like to thank my mother and niece for attending today's hearing with me.

I was brought up to believe in the fundamental values of hard work, fair play, and helping others. I believed that as long as I worked hard and did the best job possible, I would be valued by my employer. I believed that if I were ever treated unfairly, the law would protect me. I am coming to you to make sure the law protects everyone who feels the same way.

Unfortunately, I have learned from painful experience that these values are not necessarily shared by everyone. You can do a good job, play by the rules and give your utmost to your company and still suffer the effects of discrimination.

Another value I was taught was to give of myself to help others. Boston is well known for its generosity to the less fortunate. Boston hosts a large number of public events to raise money for the poor, help people with AIDS, fight hunger, and other worthy causes. I have walked, run, bicycled, danced and even rollerbladed to raise money for the less fortunate in Massachusetts.

I tell you all this, because it was my effort to help men, women and children with AIDS that led to me losing my job. I appreciate this opportunity to share my story with you in hopes nobody must endure the same discrimination I did.

I started my own computer consulting business in 1992, which I ran quite successfully for 2½ years. My business thrived, and my time was booked months in advance.

I came back to Boston to finish my college degree and despite my success as a businessman, I decided to leave my business and get a job that would allow me to go to school and obtain an undergraduate degree in Management Information Systems.

Before long, I had job offers from four companies. One of them, a software company, won me over by promising me the flexibility to go to school at night. They hired me for their technical support staff. I provided technical assistance to experienced network engineers and administrators at some of the largest corporations in the United States. Our client list was like a Who's Who of Corporate America, including the White House.

While I worked at my job, my employer repeatedly told me that I was doing a good job. He said I was meeting all his expectations, and then some. I never heard a negative comment from him about my work.

I was also well liked by the majority of my fellow employees. When I asked coworkers to sponsor me in last year's Boston to New

York AIDS Ride, they contributed a total of \$1,200. It really made me feel good to know that they supported my efforts in this area and also supported me.

I worked closely with a fellow consultant named Bob. We worked together in the server room and actually shared the same office. Part of his job was to train me on products that I would need to master in order to serve our clients. He did his job, trained me, and everything was fine. I never talked about my personal life, and he didn't ask me about it.

Things were fine until the AIDS dance-a-thon 3 months after I was hired. After Bob found out about my participation in that event, he began to distance himself from me. Over time, he refused to work in the same office with me. He stopped training me and started avoiding me. This behavior was very subtle and continued to progress as time moved on.

His behavior progressed for many months, and you can imagine that this atmosphere of hostility made it difficult for me to do my job. When I began fundraising for the Boston to New York AIDS Ride, which attracted over 3,200 riders who biked hundreds of miles to raise money for men, women and children with AIDS, I sent an E-mail around the company explaining the event and asking for their donations.

From that moment on, Bob began harassing me. He said everything I did was wrong. He refused to even be in the same room with me. One day, I walked into the server room just in time to hear Bob tell another employee that I was, quote, "just a faggot, you can't expect anything from him".

I spoke repeatedly with the Director of Human Resources about Bob's behavior; Gill simply shrugged and said that there was nothing he could do. Nevertheless, I kept Gill informed of the fact that Bob's behavior was interfering with my ability to do my job.

Bob had no more seniority than I had at the company, but he was a close personal friend of my boss. They had known each other for over 15 years. On several occasions, after my boss told Bob that he had to do his work in our office, I observed the two of them in heated conversations. Bob did not come back to the office.

Over a period of 6 months, I repeatedly asked by boss for a formal performance review. I was repeatedly denied one. Because Bob was not doing his job, I asked for the training that I needed. I never got it.

In the end, it became clear that Bob was simply not willing to work in the same company with me. My boss was put in the position of choosing between us. In November 1995, I was fired. At the time, no one would tell me the reason for my termination.

There is only one reason for the mistreatment I have suffered — that reason is discrimination. I am sure that if it weren't for the prejudice of my coworker, I would be working for them today.

After losing my job, I had trouble paying the mortgage on my home. Perhaps more important to me, I lost the chance to finish my education. Now I'm just trying to make ends meet and cover the mortgage. It will be many years before I find another opportunity to complete my education.

I've been through a lot in my life. I am not considered to be a weak person. But I must tell you that this episode has hurt quite

a lot. I was judged for a reason that has nothing to do with my talents and abilities as an employee. I was treated unfairly simply because someone else had a problem with a small part of my life.

I am here today to ask you to ensure that this sort of mistreatment doesn't happen to other Americans. The Employment Non-Discrimination Act would give people basic protection against this kind of discrimination, and it would give people a place to go when they feel they have been treated unfairly.

Because Massachusetts has a law like ENDA, I had a place to go, and I am getting a fair hearing from the Massachusetts Commission Against Discrimination. But because this type of discrimination happens everywhere in America, the same kind of protection is necessary in all 50 States. I would ask you to approve the Employment Non-Discrimination Act, and support the values of hard work and fair play that helped make this country great.

Thank you.

[Mr. Dobson's statement may be found in the appendix.]

Chairman TORKILDSEN. Thank you very much, Mr. Dobson.

Now we will hear from Mr. Dillon.

TESTIMONY OF ERNEST DILLON, U.S. POSTAL SERVICE, DETROIT, MICHIGAN

Mr. DILLON. My name is Ernest Dillon. I am grateful to this Subcommittee for inviting me to this hearing and listening as I relay some ugly experiences that have changed my life considerably.

All of my significant employment has been in service to my country. I first joined the U.S. Marine Corps in 1974, and was honorably discharged after a full tour of duty. My civilian employment began with the Internal Revenue Service and the Veterans' Administration. In 1980, I began employment with the U.S. Postal Service. It was a good job at a place I had always wanted to work.

I worked well with my coworkers. We were a very effective team, processing outgoing mail efficiently. Management was satisfied with my work performance and regular raises came in a timely manner. My first 4 years passed quickly.

In 1984, the atmosphere in my workplace began to change. A coworker, with no provocation, suspected I was gay and began making antigay remarks to me. I had known him for a while, and his change in attitude confused me. For the people in my work unit, I was the same person I had always been, a hard worker who never bothered anyone.

Whether or not I was gay had not been the topic of any conversation. I had always done my job, and I did it well. My sexual orientation had nothing to do with work. I kept work and my personal life separate.

The insults from this coworker soon escalated into more serious harassment. I repeatedly made management aware and my supervisors often witnessed the seriousness of my harassment. They neglected to act on this situation. To earn a living, I had to endure constant verbal abuse — and try to keep focused while finding outrageous things about me plastered on the walls of the office and in the trucks. Nasty things, vulgar things, hurtful and hostile things.

My supervisor said there was nothing they could do about my situation until my harasser did something. Somehow, these degrading experiences were not enough. He had to do something more. He had to do something violent.

My union representative urged me to start keeping notes of the incidents, and I did that.

This torment had broken the spirit of the office and compromised our productivity. The harassment and hatred kept us from working as a team. It wasn't fair to me, and it wasn't fair to my coworkers. The hostility was becoming so intense, I frequently considered leaving my job.

But after much thought, I decided to stay. Being a black man from Detroit, I have seen bigotry before. I had been taught at a young age that you do not run from prejudice. You persist in the face of it. You work hard, you persevere, and eventually it pays off. More than anything else, I had been taught to believe that, in America, if you did your job well, you have a right to keep it.

Then one day, while on the job, my coworker cornered me — and I thought he would kill me. He threw me on the floor, kicked me, and beat me until I was unconscious. He left me in a pool of blood. I suffered two black eyes, a severely bruised sternum, and gashes in my forehead.

When I regained consciousness, I staggered toward a supervisor who rushed me to the medical unit, and then the emergency room. I was sewn up, received medication, and spent 3 weeks recovering from my injuries.

When I finally returned to work, I was pleased to be working again, but scared to death. Although the coworker who had beaten me was fired, any relief I felt was brief. All of a sudden two other coworkers were now willing to pick up where my harasser left off. They, too, began leaving antigay messages at my work site. They also made slurs aimed at degrading me, both to my face and throughout the office.

I continued to notify my supervisors of these events. They acknowledged the patterns were the same, but again they could do nothing to stop the abuse.

I became imminently aware that, on my job, management would do nothing to protect me from another possible assault. I tried to just keep doing my job and not think about it.

But this harassment continued for 3 years. It kept chipping away at my spirit and soul. Then one day I received a death threat from one of my harassers. Fearing yet another violent incident, I went, trembling, to the staff nurse who told me to go home for the day. I called a therapist who advised me to get help. He removed me from that hostile work environment, and suggested I file a worker's compensation claim and initiate a case with the Equal Employment Opportunity office.

The EEO office accepted my case and I thought that something would be done to fix my work situation. I could not believe that people were allowed to torment you on the job — and get away with it. While I had been getting my work done, the environment had gotten so dangerous that I feared for my life and my self-esteem.

The discrimination was so intense it had forced me from my job. It just wasn't fair.

After the EEO investigation and hearings, the administrative panel ruled that I had been wronged. Then, the appeals began. After many months of anguish and anticipation, my case reached the 6th Circuit Court of Appeals, who said that the law of the United States just did not protect me.

The judge said: "Dillon's coworkers deprived him of a proper work environment because they believed him to be homosexual. Their comments, graffiti, and assaults were all directed at demeaning him solely because they disapproved vehemently of his alleged homosexuality. These actions, although cruel, are not made illegal by Title VII."

These actions, although cruel, are not made illegal by Title VII.

I turned to my union, my supervisors, my doctor, and the court — only to find that in America, I am not entitled to be able to work without fearing for my life. I am not entitled to equal protection. Well that's just wrong. That's not how I was raised. That is not what I was taught to believe in. Something has to be done, and soon.

I have now gone back to work for the post office, but at a different branch. Luckily, I have not had to endure intolerable harassment or discrimination. But without a Federal law prohibiting this kind of discrimination, my job, my livelihood, and my safety, is only a matter of luck.

I finally turn to you, the lawmakers of this country. Please help me and the thousands of other Americans who suffer discrimination.

We want what every other American wants — the equal opportunity upon which this great country was founded, the ability to work, to be treated fairly, to be judged by our performance and abilities, and to be free from discrimination and harassment. I look to Congress for leadership in stopping the pain and prejudice, to give to me and thousands of Americans the secure right to live the American Dream. I ask that you pass the Employment Non-Discrimination Act to protect us from this kind of discrimination.

Thank you.

[Mr. Dillon's statement may be found in the appendix.]

Chairman TORKILDSEN. Thank you, Mr. Dillon.

Ms. MILLENDER-McDONALD. I want to commend all of you. You are great Americans and we are better off because you have crossed our paths.

Chairman TORKILDSEN. Thank you, Ms. Millender-McDonald. Mr. Jackson has also asked to submit statements and they will appear at the beginning of the record.

[Ms. Millender-McDonald's statement may be found in the appendix.]

[Mr. Jackson's statement may be found in the appendix.]

Thank you for your moving testimony and I would like to hear from Ms. Solon.

TESTIMONY OF KAREN SOLON, CHILD DEVELOPMENT CENTER, FALLS CHURCH, VIRGINIA

Ms. SOLON. My name is Karen Solon.

Mr. Chairman and distinguished members of the Subcommittee. Thank you for giving me this opportunity to share with you my experiences and beliefs regarding the problem of job discrimination. I have learned, through painful personal experience, that one does not need to be gay oneself, but simply a family member or supporter, to suffer discrimination in the workplace.

I am not gay. I am happily married to a wonderful man, and we are very proud of our four grown children. I am also a deeply religious person, brought up to believe in the inherent worth and dignity of every person. Working for social justice and equality is an expression of that principle.

I have devoted my life to the care of children. I began my professional career in a Head Start program, but for over 17 years I combined my family and career goals by opening a family day care business in my home. I co-founded the Northern Virginia Family Day Care Association, which grew to a membership of 500 dedicated professionals, committed to providing quality child care for Northern Virginia's working families.

In addition, I voluntarily participated in several county programs in order to provide care for children with a variety of physical, mental, emotional, and financial needs. In 1991, Fairfax County Office for Children awarded me special recognition for exceptional service and excellence in providing child care for children with special needs.

Underlying my life choices is my belief in a moral and civic responsibility to care about all children, regardless of their differences. For the same reason, I am a member of an organization called Parents, Families and Friends of Lesbians and Gays, commonly known as PFLAG. Founded by parents, it provides a much needed support to its members. I came to recognize the need for such an organization because of the pain and prejudice suffered by people close to me.

About 4½ years ago, my family took into our home a high school senior, who was homeless and estranged from her abusive family. We have come to love her as a daughter. Later, this bright, ambitious and talented young woman went off to college on a full ROTC nursing scholarship. But coming to terms with her identity as a lesbian during her freshman year meant giving up both the scholarship and her dream of becoming a career military nurse, in order to live her life with honesty and integrity. She has new dreams. She will travel next month to Rumania to work in an orphanage there. But when she gets back, the prejudice of others will continue to pose a potential obstacle to her future dreams and job security.

Two childhood friends have recently confided to me the pain and isolation of growing up gay in our rural New England village in Massachusetts. Both have spent their lives aware of the constant danger of harassment, violence, and discrimination. One expressed concern about my testifying fearing my disclosing her identity could cost her her job. I joined PFLAG for them, for my daughter, and for the untold millions of lesbian and gay people who need their families and friends to stand up for them.

I never dreamed that my membership in PFLAG could cost me a job. But it did.

Last year, with my children grown, I decided to close my successful day care business to work outside my home. Because of my experience and qualifications, I was soon offered, and accepted, a position at a local child development center.

That same day, however, I received a phone call from the director of a preschool in my neighborhood, inviting me to interview for a position. The position would offer me more money, better hours, a location within walking distance of my home, and a chance to learn new skills.

Needless to say, I was excited about this turn of events. The next morning, the director called to invite me to visit the school for a classroom observation. I snatched up my coat and ran off. I had a wonderful morning with both staff and children.

In the afternoon, when I sat down to talk with the director, the first thing she said, with a long face, was, "Tell be about the button." At first I was puzzled, but then I realized she was referring to a pin on the lapel of my overcoat, draped over a nearby chair. It identified me as a member of PFLAG.

In retrospect, I wish it had occurred to me to remove it before showing up for the interview. I firmly believe that teachers should not wear their personal beliefs on their sleeve in the workplace. We are bound by professional ethics to leave our social, political and religious activities at the school house door.

When I told her how it happened to be on my overcoat, she asked me how I got involved in the issue. I hesitated, wondering what this had to do with my job, but she had asked, and at the time I saw no reason not to answer honestly. She proceeded to offer me the job, but her tone and manner clearly reflected lingering reservations. But I decided to let it go, confident that my performance in the classroom would eventually prove that my beliefs would not interfere with my work.

Three days later, she stopped by my house to drop off some documents I needed to fill out. On my front steps was a stack of our local gay newspapers that was destined for delivery to my church, to be included with other materials. I had volunteered to bring the papers to church, and they had been dropped off on my steps that day. I explained that to the director, and she left the forms with me.

The next evening, she called me at home to revoke the job offer. She said my support of gay and lesbian people was too controversial. She acknowledged that I had discussed my beliefs with her only at her request, but that didn't matter. I was out of a job.

To say the least, I was stunned, and even frightened. I was being denied the opportunity to do a job that I do well, and denied it for a reason that had nothing to do with my qualifications. All my years of experience, dedication and hard work meant nothing. Activities undertaken at church and in my private life could be used to deny me the chance to serve my community and earn a living.

I lost this job because I had revealed, however inadvertently, a belief in the inherent dignity and worth of people I care about. Through this experience, I came to know the isolation, pain and fear that many gay and lesbian people must feel, having to go through life in danger of losing their jobs just for being who they are. It just isn't fair.

I understand that there are people of faith who may disagree with my religious belief on this issue. The freedom for each of us to believe differently according to our own conscience is very precious to me. It really is. But in the context of the workplace, we must put such differences aside and treat each other fairly. The purpose of the workplace is to do one's job, to do it well and to contribute to the success of the enterprise, no matter what it is. Government has a responsibility to ensure that some people's personal beliefs do not impinge on the right of others to earn a living.

Luckily for me, the child development center that had offered me a job in the first place welcomed me back. I continue to do the work that I love. I believe, more firmly than ever, that our laws must reflect the moral, ethical and spiritual imperative that we human beings must treat each other fairly, regardless of our differences. That is why I am here today to ask you to pass the Employment Non-Discrimination Act.

Thank you for listening.

[Ms. Solon's statement may be found in the appendix.]

Chairman TORKILDSEN. Thank you for your testimony, Ms. Solon, and again I would applaud all the witnesses on this panel for speaking in a way that only personal experience allows you to testify, but really brings some extremely important information to this entire debate.

Clearly, this bill is not about an abstract. It is about the lives of real people and only by your sharing your real experiences do I think that can be conveyed, and I thank you for that. I would like to ask either of my colleagues that are near if they have any questions for anyone on this panel.

Mr. POSHARD. Thank you, Mr. Chairman.

Mr. Dobson, I would direct this toward you notwithstanding the discouraging sequence of events that took place in your life, you did mention that you were glad that you lived in a State that had some laws that afforded you some protection. What is the difference? I mean, how is it different for you living in a State that does that as opposed to the — I mean, this is indigenous to Massachusetts and maybe eight or nine other States in the Union right now, as I understand this set of laws, but how is it different for you? What makes you feel better about living there than living somewhere else and how is this law going to make a difference if it is passed eventually by this Congress?

Mr. DOBSON. Good question. I didn't know about that. I found out about the MCAD only after I was fired, but at that point in time it was too late, sir. The damage was done to me and the damage is very deep.

What the MCAD is out there for is to hear from me either afterwards, but most importantly before I am either forced out of my job or before I am fired from a job that I like very much, I want, and that is my sole focus for coming here. I don't care what happens with my court case that is in front of the MCAD, but if I can raise awareness to the local people in Massachusetts that the MCAD is out there for anybody, black, white, Jewish, any background, that if they are discriminated against, they need to take steps to their Director of Human Resources. When this fails, they need to take steps outside of the company to an organization like

the MCAD so that they can hopefully maintain their working environment, their prestige within themselves and a good environment for everyone around them.

The MCAD could have stepped in, maybe negotiated with a company that diversity training was done. I would still be working, I would be getting my degree. I would probably be graduating in another year and I would be a very happy person. That didn't happen. Right now, my fate with this case lies with the MCAD and I feel strongly that they will come back and say one way or the other, for the company or for myself, that this was what was done. This is what happened and this is where it is at. I don't care if I lose that case or not.

When I decided to come here, I said that I wanted people to know that the MCAD in the State of Massachusetts stands for something and we need to use it. Now, how it will affect the bill here or what does this bill have as far as effect? It gives people like myself a place to go when you pass this law, then you are going to say to the United States that if you are discriminated against for this specific reason, you have an alternative.

It is very difficult for someone to take this stand and to go to the MCAD because as of the second phase of your filing, it is public knowledge. Anybody, an employer doing a background check, a newspaper reporter, anybody can then find out that you are gay or of a minority group and therefore you open yourself up for discrimination across the board. I don't wear my homosexuality on my sleeve.

I don't walk in my workplace and think that my personal life has a visible force there; my personal life stays at home with me. However, they took it away from me and they used it against me, and that is where this bill will help people such as myself, so that their pride and dignity is not used to slap them in the face.

Mr. POSHARD. Thank you.

Mr. Chairman, if I may pose another question, just to help me better understand this a little bit. Anyone on the panel can respond to this. Did any of you ever get a chance to just sit down one on one, eyeball to eyeball, and talk to the people who were perpetrating the discrimination toward you?

What I am interested in knowing is, I understand if a person disagrees with the life-style. Everybody has differences of opinion in this country on lots of things. But what is it in the mind set of a person that causes them, with particular regard to this issue, to do more than just disagree and agree to disagree but steps over the line to try to hurt?

Did you ever talk with this gentleman? Did any of you ever talk to the people and just try to get inside their head and ask why the necessity for that?

Ms. SOLON. I did.

Do you want to go first?

Mr. DOBSON. If I may, I will open dialogue with anyone at any time who either asks or comes to me. I did not get an opportunity to speak with this specific person. I did get an opportunity to speak with the company through going to the director of H.R.

One week before I was fired, I was promised, I was told that, "Todd, there is no way I will ever allow anyone to fire you." Those were his exact words from the director of H.R.

One week to that day later, he was the one who suspended me pending investigation, and it took 2 weeks after that when they fired me, and he was the one that said, "You are fired."

I tried to speak with the company, and the company wanted me to come into a closed-door session without my attorney, seven of them against me to discuss this. Basically, they wanted me to know that there was no way this was going forward as I saw it, that this was not discrimination. So, as far as speaking with an individual person, I never had that opportunity.

You are an open-minded man. I would love to discuss any issues that you have at any time fairly, straight across the board. You may disagree, and I respect your disagreement, I respect you as a person for taking that stance. But I must ask you for your respect, saying I am an individual; I can live a different life; I don't want to call it a life-style; but as long as I don't impinge upon your life, then I am all right.

Mr. POSHARD. Thank you.

Ms. Solon.

Ms. SOLON. Thank you very much for asking that question.

I first of all want to state that I don't think any of us can ever get inside someone else's head, and it is a little bit, I think, inappropriate to think that we can do that. But I certainly did want to understand, and I was fortunate to be able to have quite a nice dialogue actually with the director. She and I have been colleagues over 9 years. We have worked together very successfully. We exchanged referrals. I referred children to her, and she to me. I tried to count. There are no fewer than six families that we both provided services to. So, she knew who I was when she called me to ask me to interview.

When she phoned me that night to revoke this job offer, I have to tell you, as disappointed as I was, I felt very sorry for her. She was very different from the effervescent person that I was accustomed to when we talked together. There was real anguish. She was very cold.

I just said to her, "Judy, this hurts all of us. It hurts me, it hurts you, it hurts the kids. If I am going to need to deal with this disappointment, I'd like to know why.

She knew how much I was wanting this job, looked forward to working with her for years. We had talked about another previous possibility. What she said was that it was, "just too controversial."

Her fear was that — again, this is what she said. I don't know what was in her head. What she said was, "If the families were to somehow find out . . ." I talked about not wearing anything identifying myself. There is no way they could tell. I asked her how they would know, but she said if they were to somehow find out, they could pull their kids out of her school. Part of her concern, we could assume, is a business one.

Fair-minded people like my friend could benefit so enormously from this bill. They could answer angry parents who ask, "Why do you have someone who supports gay people?" They could say, "It

is the law. We don't discriminate based on someone supporting gay people."

I also want to commend you for your candor and your respect. I have corresponded with a minister, one of President Clinton's five favorite preachers, I gather from Newsweek magazine, who believes his interpretation of scripture prohibits him from engaging in same-sex relationships. Yet he is a strong supporter of civil rights for gay and lesbian people. He can hold those two views simultaneously.

So I don't think, in answer to your question, that passing this legislation means that you are endorsing same-sex relationships. I think it simply says that people will disagree on this one, with very deep religious convictions based on different interpretations of scripture. Just as we respect different people's religious beliefs and backgrounds, we don't have to choose, thank God, in this country which religion is the right one.

What we do say is that we respect the people who hold those beliefs. It is a little different from condoning the belief. We respect the person as a human being, entitled to earn a living and to be free from the kind of harassment described here today.

Could I add one more quick thing. There was a comment made by a 9-year-old girl trying to understand library censorship. Her comment to me was, "If it's not for everybody, why do they call it public?" And I want to leave you with that thought.

Chairman TORKILDSEN. Thank you.

The gentleman from Massachusetts, Mr. Studds.

Mr. STUDDS. Mr. Chairman, I have been here an embarrassing number of years, but I think I can say I have never heard testimony of greater dignity. Towards the end of, I think it is "A Farewell to Arms," Hemingway says, "The world breaks everyone, then some become strong at the broken places." There are five very strong people at this table.

I thank you.

Chairman TORKILDSEN. Thank you very much. Very well said.

I would like to thank all of you again for your testimony. I will have additional questions for you. We are on a time limit on how long we can use this hearing room. Another Committee has scheduled it. I would ask that all of you be available to respond to written questions from myself or other members. The Subcommittee thanks you for your very important testimony.

I would like to ask the final panel to come forward, our third and final panel of experts in the area of antidiscrimination policy.

The witnesses are, first of all, Elizabeth Birch of the Human Rights Campaign; Karen Kerrigan of the Small Business Survival Family Research Council; Michael Duffy of the Massachusetts Commission Against Discrimination; and Chai Feldblum, an Associate Professor of Law at Georgetown University Law Center, Director of the Federal Legislation Clinic at the law school.

We welcome all of you.

Ms. Birch, if you would please start with your testimony.

TESTIMONY OF ELIZABETH BIRCH, EXECUTIVE DIRECTOR, HUMAN RIGHTS CAMPAIGN

Ms. BIRCH. Mr. Chairman and members of the Subcommittee, thank you for the opportunity to testify today in support of the Employment Non-Discrimination Act.

I am the Executive Director of the Human Rights Campaign, the Nation's largest gay and lesbian political organization. I speak on behalf of the Human Rights Campaign, our more than 175,000 members nationwide, our friends and families, and the majority of fair-minded Americans who support us in our effort to win equal rights in the workplace.

You show a great deal of integrity by pursuing an inquiry into this area. I wish Representative Studds was still here, because I wanted to say we are very, very proud of Representative Studds and we are going to miss him very, very much. We miss you now, Mr. Studds.

Mr. STUDDS. I never would have left, even for that.

Ms. BIRCH. Prior to assuming this position, I enjoyed a very successful and robust career in corporate America, where I serve as head of litigation for a Fortune 100 company and general counsel for one of its subsidiary companies. I have also had the privilege of assisting dozens of companies in instituting ENDA-type non-discrimination policies. I have watched a number of the Nation's finest companies and most prominent chief executive officers come to the conclusion that to value the work of each individual, to attract talent from the broadest pool, to deepen employee motivation, commitment, and loyalty, and to honor the values of fairness and nondiscrimination on which this Nation was founded — in short, to run the best business possible — to do these things, there was simply no other wise choice but to institute such policies.

America is united as a Nation by a simple but profound creed, that all people are created equal. These are simple words that speak profound truths. They provide clear direction for us as a society and for you as lawmakers. Each American is to be considered of equal worth as a human being, and we should each be treated fairly by our Government, by our laws, and by each other. To secure democracy for posterity, to establish justice and ensure domestic tranquillity, all people must be assured of their basic, equal rights.

Today it is still perfectly legal under Federal law to fire a person simply because he or she is gay, lesbian, or bisexual. You can be fired in this country simply because you are gay. Let that sink in for a moment because it is reminiscent of other cruel, shameful moments in American history. That is why the Employment Non-Discrimination Act is necessary.

As the history of slavery and the civil rights movement makes clear, America has struggled long and hard to live up to the promise made in our country's founding documents. About 220 years after the signing of the Constitution and the Declaration of Independence, we are still coming to grips with the difficult challenges that accompany our rich human diversity. Today, gay Americans, along with our families, friends, and supporters, are still waiting to see this promise kept.

What we know from other cruel and painful social struggles of the past is that this promise must be kept, for when it isn't, it tears at the very heart, the core, the fabric of what holds the Nation together in the first instance. This is the genius of the American form of democracy, not that the founders were free from prejudice in every form but that they created a body, a machine, of truth that over time — and sometimes it is slow in coming — rejects toxic discrimination that undermines the basic humanity of the Nation as a whole.

Mr. Chairman, let's make no mistake about it. This kind of discrimination happens in every region of the country. It strikes all kinds of workplaces and hurts all kinds of people. Some, straight and gay, actually endure violence and humiliation just for trying to do what is right. It is un-American, it is unbusinesslike, and it is wrong. But it remains sanctioned by Federal law or, rather, by the absence of any law prohibiting it.

This Subcommittee has heard the stories of hard-working, honest people who did their jobs, paid their taxes, and contributed to their communities, only to be singled out for discrimination.

We have seen corporate America respond to the challenges of global competition and the changing nature of the workplace, and I am proud to say that American business is way ahead of Congress when it comes to ensuring the fair treatment of gay and lesbian people. A growing number of the Fortune 500 companies — about half — have instituted policies in line with the goals of ENDA.

Successful companies that have actually endorsed this legislation come from a variety of industries. They include some of the best known household names in American business, such as Quaker Oats, IBM, AT&T, Kodak, Nabisco, Xerox, and even Harley Davidson. Some of America's fastest growing success stories such as Microsoft, the Gap, and Ben & Jerry's see such policies as standard business practices — part of valuing all employees.

I want to invite you to step into the shoes of every CEO who has had to make this decision, and we are talking about hundreds of them. That person has to consider views of nongay employees, many of them in field office all over the country, executive management team, the board of directors, the shareholders and customers, and in each and every case the decisionmaking journey has been the same: How can the value of Mary, who is lesbian but an incredible line worker, or accountant, be any less valuable than Fred who happens to be straight and work in operations?

You see, the CEO's of this country have concluded what most parents have concluded about their gay children: The world is enriched by their loyalty, their contributions, their labor and deep commitment to community and family. These CEO's have real human beings in mind when they make these decisions, not cruel and dehumanizing stereotypes.

Once more, the American people are way ahead of Congress on this. When the Human Rights Campaign began commissioning polls on this topic a few years ago, we found that 74 percent of Americans — the majority of Republicans, Democrats, and independents — support this type of legislation. That number has grown steadily. In May of this year a Newsweek poll found that 84

percent of Americans support equal rights in employment for gay and lesbian people. More recently still, in June, an Associated Press poll found that 80 percent surveyed support this type of legislation.

But what of the few who do not agree with these fundamental values? As Americans, we are all free to believe as we wish, but as citizens of a large and increasingly diverse Nation, we must accept certain responsibilities. Chief among them is the responsibility to treat each other fairly with basic respect and common decency. Without compliance to these virtues, our society would not function.

I am going to allow you to move on to the next witness because I know you are short on time. I thank you very, very much for this opportunity.

Chairman TORKILDSEN. Thank you for your very moving testimony, Ms. Birch. Your entire statement will appear in the record.

[Ms. Birch's statement may be found in the appendix.]

Mr. Duffy.

TESTIMONY OF MICHAEL T. DUFFY, MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

Mr. DUFFY. Chairman Torkildsen and members of the Subcommittee on Government Programs, good day. My name is Michael Duffy, and I am the Chair Commissioner for the Massachusetts Commission Against Discrimination — MCAD — and a Member of the Weld Cellucci administration.

I speak today not only as a gay man who is also an active member of the Republican Party but as an American who does not see this as a partisan issue but as one that involves all Americans interested in creating a just society.

The commission has been responsible in enforcing the 1989 Massachusetts statute that protects gays and lesbians in the workplace. It is also the chief civil rights enforcement agency for the Commonwealth of Massachusetts. With this unique position, I hope to address some key issues on this important topic.

What direction is the United States going to take on this issue? Years ago a heroic movement began and was directed toward wiping out oppression and actual acts of violence. Swastikas, broken arms, and the threat of physical violence — these were the objects of discrimination that our country took aim at. These were the types of workplace conditions that Title VII attempted to eliminate in 1964.

This is not to say that the Congress or President Johnson naively thought that these conditions would fantastically disappear once Title VII was enacted, but with this legislation our Government made an economic commitment to create a socially just society. It made a commitment to black and white Americans, Catholics, Jews, women, minorities, and the majority. What the Federal Government of these United States did was make a commitment to all Americans, saying that we as a people would not tolerate discrimination in the workplace; we as a people stand firmly together in one pluralistic society ready to defend one another.

Yet what of the lesbian or the gay man? Somehow in this great endeavor they slipped out of view, and as a result the promise of

1964 has not been completely fulfilled. In many parts of our Union, those conditions that I spoke of at the beginning are still endured by Americans. They have not received civil rights protection from their own Government.

A qualified doctor can be denied a position simply because he is gay. A carpenter can be physically assaulted and humiliated because she is gay. A janitor attempting to support himself can be harassed and have swastikas carved on his locker, and our Federal Government will turn its head away simply because he is a gay man. One begins to think that Justice is not so blind.

Massachusetts has attempted to rectify this unjust situation. Through bold leadership, Massachusetts has made Government responsive to all Americans, and not just those who are perceived as being heterosexual. The doctor, carpenter, and janitor all have protection simply because they live within the boundaries of Massachusetts. But if they were to travel outside of Massachusetts, it would be like a black American taking a time machine 40 years into the past. All these protections vanish away. Strange to think that a State boundary can change a person from a citizen into a second-class citizen.

Does the homosexual really need legal protection to secure his full citizenship? Does the doctor, carpenter, and janitor really get discriminated against? If they don't, what is the issue?

I want to talk a little bit about the cases that have been filed in the commission. The MCAD has had 683 cases that have been filed during this 6-year period. My belief is that the level of discrimination is much higher in all areas but that homosexuals are afraid or unaware of the current protection. This belief is supported by considerable studies and my own observations and the testimony of the witnesses who were here today about their reluctance to come forward and take action when they experienced discrimination in the workplace.

Earlier on in the discussion I mentioned three occupations: A doctor, a carpenter, and a janitor. These three are examples of real cases that the MCAD has addressed. The cases of the doctor and carpenter are examples of files that were settled before a public hearing was held where the case of the janitor was one that made it all the way. These three individuals demonstrate diversity, represent different economic classes and different forms of discrimination, but they share the status of gay or lesbian. Their stories tell that any gay person is vulnerable to discrimination.

Dr. Cantor's case is an example of a gay individual being denied employment simply because his sexual orientation does not meet the norm. Dr. Cantor was applying for employment. He was given an offer of employment that was made on the condition that his references cleared the screening process. Dr. Cantor was only required to have three references. Four of the six gave extraordinarily high marks to the recruiter who had been actively pursuing Dr. Cantor.

The person who was talking to Dr. Cantor's references overstepped the fair playing ground when he began to inquire about Dr. Cantor's sexual orientation. He asked a co-worker if he was, in fact, a homosexual. It was clear that this unfairly increased the scope of his employment investigation. It was relayed to the hospital that

Dr. Cantor was, in fact, gay. His offer of employment was subsequently rescinded, and Dr. Cantor came to the commission and filed a complaint. The commission investigated, found probable cause, and eventually settled the case.

There are two other cases in here I would like to go over. The second is Louise Vera, who was employed as a carpenter and is a member of the Brotherhood of Carpenters and Joiners, Local 108. The union demeaned, threatened, and physically assaulted Ms. Vera because she was a lesbian. The physical violence that occurred is an example of the unsafe work conditions that gays and lesbians face on a daily basis. It is the direct result.

However, some may say this cannot be the case. After all, if Government protection was all that was needed to secure the rights of gays and lesbians, there would be no discrimination in States like Massachusetts. This obviously does not fully deal with the issue. Government cannot wipe out discrimination with legislation. But what does happen is that that Government influences the culture and says that this type of behavior is unacceptable; it does not affirm the value of the human person.

The last case that I dealt with, or that I would like to deal with today, is one that I dealt with personally and heard at a public hearing, a formal public hearing that was held at the commission with the finder of fact.

Leon Magane was an employee in a real estate company in Worcester, Massachusetts. On several occasions during his employment, Mr. Magane found pornographic pictures taped to his locker. Later he found a swastika. During the evening he received harassing phone calls at his home. He was humiliated and dehumanized. More pictures were placed on his locker in addition.

Interestingly enough, it was MaGane, not his supervisors, that wanted his sexuality to remain private. Magane did not see why his sexual orientation involved his job duties. Magane testified at public hearings very convincingly and very movingly about the events that transpired during the course of his employment, and, as a result, they ruled in his favor and awarded a considerable amount of emotional distress damages to him. Neither he nor Dr. Cantor ever made their sexual orientation an issue in the workplace, but it was others who subsequently did.

I would like to also point out that those complainants who bring their cases to the commission do not announce their sexuality. Once they enter the workplace door, they are usually discovered or they simply let their guard down. It is my observation even victims of gay discrimination are reluctant to come forward and file complaints because, for many gays and lesbians, filing involves coming out and exposing intimate details of their lives.

Interestingly, the number of cases that have been filed at the commission since this law went into effect have been cases filed of sexual orientation statutes.

In closing, I would just like to say thank you for your help in preparing these remarks. A few days ago in Washington I took down these words that were written on the wall of the Jefferson Memorial. I thought they were particularly appropriate for this hearing.

Jefferson said, "I am not an advocate of frequent changes in laws and existing institutions, but laws and institutions must go hand

in hand with the progress of the human mind. As that becomes more developed, more enlightened, and new discoveries are made, new truths are discovered and manners and opinions change and change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat that fitted him when a boy a civilized society to remain ever under the regimen of their barbarous ancestors."

The need for this type of legislation is clear. Therefore, I urge you to enact this important legislation.

[Mr. Duffy's statement may be found in the appendix.]

Chairman TORKILDSEN. Thank you for your testimony, and also thank you for summarizing. Your full statement will appear in its entirety.

Professor Chai Feldblum, thank you for being patient. We would like to hear from you now.

TESTIMONY OF CHAI R. FELDBLUM, GEORGETOWN UNIVERSITY LAW CENTER

Ms. FELDBLUM. Thank you.

Mr. Chairman, my written statement is probably longer than any of the other witnesses, and I ask that it be submitted in full. I am going to try to make my oral remarks the briefest.

The expertise I bring here is both academic and practical. As an academic matter, I teach sexual orientation and the law at Georgetown University Law Center. I recently wrote an article on sexual orientation and morality in the law.

Congressman Poshard, I look forward to actually giving you and the other members of the Subcommittee a copy of the article. It would violate a cardinal rule which I teach my students in the Federal Legislation Clinic, which is never to give anything to the Congress which is more than 5 pages, and certainly not with footnotes.

This is a classic law review article. But it addresses exactly the issue you have brought forward, I thought, in an incredibly sensitive and respectful way, and I appreciate that.

I also bring a practical expertise in that I serve as a legislative lawyer on a consultant basis to the Human Rights Campaign. In that role, for about 3 years, I have served as a legal expert to Congress in the formulation of the Employment Non-Discrimination Act.

My written testimony describes the fact that there is no protection against discrimination right now for gay people. Even if the Constitution was ever held to protect against such discrimination, it would apply only to the Government. So, Government employment, not private employment would be covered. I also describe how discrimination has evolved against gay men and lesbians today.

I wanted to just note here in this brief statement what ENDA, which is what we call this bill, the Employment Non-Discrimination Act, does and does not do as a legal matter.

As a legal matter, the core of ENDA is about 10 lines long, in Section 2. It says that a covered entity may not, in employment and employment opportunities, apply different standards to an individual based on sexual orientation. That is, an individual — be they gay, lesbian, bisexual, heterosexual — may not be treated dif-

ferently — no better, no worse — based on sexual orientation. That is the core of ENDA.

“Covered entities” in ENDA is exactly the definition under Title VII, which means private employers with more than 15 employees. In fact, when you look at the history of the Civil Rights Act, Congress started with covering 100 employees, they phased in the coverage because there was an issue of education. ENDA covers governmental employers; it covers Congress. It does not cover employment decisions of private membership clubs that are tax exempt, which is something that Congressman Campbell and I were talking about this morning.

“Employment and employment opportunities” also means exactly what it is in Title VII, anything dealing with employment — firing, hiring, promotion, terms and conditions of employment, harassment.

The definition of “sexual orientation” includes people who are homosexual, bisexual, or heterosexual, or who are perceived to be homosexual or bisexual. You heard today the reason that is so important. Most gay people do not talk about being gay at the workplace. The common scenario is not: “Hi. I am Ernest. I am gay. How are you?” But sometimes people are perceived to be gay, sometimes correctly, sometimes incorrectly; sometimes, as Nan pointed out, you never know. ENDA is drafted to ensure these people are given recourse against discrimination.

ENDA also protects against people who associate with people based on their sexual orientation. That is also in those 10 lines. So that the stories you heard today of the person whose job gets yanked because she works with PFFLAG is also covered under this law.

As I said, my written testimony talks about the things ENDA doesn't do, which are policy decisions Congress has made: not to use this bill as a vehicle to mandate benefits for same-sex partners, not to use this bill to lift the ban on gay people in the military; to say clearly in this bill that employers may not give preferential treatment based on sexual orientation—which is a prohibition that goes beyond Title VII, which allows employers to use preferential treatment, within bounds, based on race and gender. It says that religious organizations are exempt. These are all policy decisions Congress has made in drafting this bill.

Let me tell you that a lot of hard work went into drafting this legislation. I think that what is before you today represents a reasoned and balanced approach to the problem of employment discrimination. It is, I believe, a truly moral response to the problem of discrimination that still exists in this Nation.

Thank you.

[Ms. Feldblum's statement may be found in the appendix.]

Chairman TORKILDSEN. Thank you very much for your testimony.

Congressman Poshard or Congressman Studds, any questions or comments?

Mr. POSHARD. Mr. Chairman, only to say thank you to the panel. I do have some questions at this time.

Chairman TORKILDSEN. Thank you.

Congressman Studds?

Ms. STUDDS. I want to thank Chai Feldblum for unprecedented brevity in the face of challenge.

I also want to say to Mr. Duffy, that is one of my favorite quotes from Jefferson too, about our barbarous ancestors. But be careful, you are in an institution which worships our barbarous ancestors. Come to think of it, some of the newborns — oh, never mind.

Let me just say finally, once again, Mr. Chairman, once again I salute you.

If I may, Mr. Poshard, if I felt that the approach of all of our colleagues were as yours, I would feel very, very good indeed.

May I say this journey has a long way to go, but this has been a very, very, very important and very eloquent step in that direction. All of you, who have hurt a great deal, should feel very, very secure in the knowledge that we are going to get there.

Thank you, Mr. Chairman.

Chairman TORKILDSEN. Thank you, Mr. Studds. I will echo those comments. Indeed, it is a small but important first step. I appreciate the testimony of this panel and all of the panels.

It is a long way to go to educate individuals, especially when it is a subject matter perhaps with which they perhaps have not had any first-person encounter, but it is only because of the examples of individuals and the study you bring to us that we can educate people about the need for this legislation. Again, it will not become law in this Congress, but in a future Congress it will become law, and we all look forward to that day.

I would ask unanimous consent that the record remain open for 2 weeks for any member to add a statement if they wish to, or to submit questions for any of the witnesses. I would ask all of the witnesses to be available to respond.

I thank you for your testimony. This hearing is adjourned.

[Whereupon, at 12:40 p.m., the Subcommittee was adjourned, subject to the call of the Chair.]

APPENDIX

PETER G. TORKILDSEN, MASSACHUSETTS
CHAIRMAN

GLENN POSNARD, ILLINOIS
RANKING MINORITY MEMBER

Congress of the United States
House of Representatives
104th Congress
Committee on Small Business
Subcommittee on Government Programs
8-101 Rayburn House Office Building
Washington, DC 20515

OPENING STATEMENT

CONGRESSMAN PETER G. TORKILDSEN

CHAIRMAN, SUBCOMMITTEE ON GOVERNMENT PROGRAMS
COMMITTEE ON SMALL BUSINESS

OVERSIGHT HEARING ON
HR 1863, THE EMPLOYMENT NON-DISCRIMINATION ACT OF 1995

JULY 17, 1996
10:00 am
2167 RAYBURN HOUSE OFFICE BUILDING

Good morning. It is a pleasure as the Chairman of the Small Business Committee's Subcommittee on Government Programs to welcome our witnesses and guests to today's hearing. Today's hearing is on HR 1863, the Employment Non-Discrimination Act, also known as

ENDA. It was introduced by our colleague Gerry Studds and 118 other members of Congress.

I am pleased that three of our colleagues are testifying before the Subcommittee this morning, and I applaud their leadership on this issue.

Our witnesses today are comprised of people with a very real experience and a professional expertise in the area of workplace anti-discrimination efforts. For the record, it is noted that several individuals opposed to this legislation were also invited to testify, but for various reasons did not choose, or where not able to do so.

A representative of Small Business Survival Committee had looked forward to testifying on the bill, but could not. According to her office, she is unable to testify in person due to a medical emergency, but will submit a written statement.

The subcommittee also invited a representative of the Family

Research Council to testify. The FRC had accepted the sub-committee's invitation. Until yesterday, the sub-committee was expecting a representative of FRC to testify. In addition, late last week the FRC requested that two other individuals be allowed to testify in opposition to the bill. Both individuals were invited: one did not respond to the invitation, and the other stated he is not able to be here today, but that he might submit a statement for the record. Yesterday, the FRC notified the subcommittee that they would not send a representative to testify.

Today, though, we have many witnesses looking forward to testifying about this important legislation.

The Employment Non-Discrimination Act is a bill that deserves our attention because it represents a reasoned approach to an unreasonable problem facing all Americans. Discrimination in the work place, even if it isn't targeted at all Americans, absolutely harms all Americans.

Every year, Americans suffer discrimination on the basis of their sexual orientation. They are harassed, demoted, fired, and in some extreme cases, physically abused in their places of work -- not because they are poor employees, but simply because they are perceived to be, or are, gay.

Five Americans will tell their stories of discrimination to the Subcommittee today. They represent a cross section of America -- but they have one thing in common; they have all suffered the indignities of discrimination and the devastation of losing their job for reasons that have nothing to do with their job performance.

The Republican Party's core beliefs include personal freedom and equal opportunity. Nowhere is this more important than in the marketplace and the workplace. Discrimination is anathema to personal freedom, and it impedes equal opportunity.

The Subcommittee was struck by the number of Americans who don't realize that there is absolutely no legal protection for gay and

lesbians in the workplace. Eight out of ten believe that “some federal law” or the Constitution protects these workers.

Americans have a basic sense of fairness when it comes to workplace issues. According to two recent national polls, Americans support equal – not special – rights for gays and lesbians in the workplace (*Newsweek* - May - 84%; *Associated Press* - June - 85%).

When reviewing this legislation, it is important to look at it from more than one perspective. First is the immediate impact of providing a stable, healthy, and productive work environment for employees. Recognizing this, numerous companies across the United States have already adopted their own anti-discrimination policies. These companies include small businesses, colleges and universities and Fortune 500 companies. Unfortunately, this is a fraction of the 6.8 million private and public workplaces in America.

Second, the long term impact of discrimination has the potential of impeding our nation’s progress in the 21st century global marketplace.

Employers will only hurt themselves by not pulling from the most talented applicant pool and providing those employees with tolerant work environments.

And while discussing what ENDA is, a direct way to give Americans equal job protection in the workplace, it is also important to discuss what it is not.

ENDA is not a law that requires, or even allows, quotas or special preferences. The legislation as drafted specifically prohibits quotas.

ENDA is not a law that would require religious organizations to follow it, as religious organizations would be exempt, as would very small businesses -- those with fifteen or fewer employees.

In recent years, I have met with many constituents who conveyed to me their personal fears and frustrations regarding workplace discrimination. It is for those constituents that I hold this hearing today.

This is an issue of basic fairness. It is my hope that the testimony given here today will constructively contribute to the national debate and lead to a better understanding of this issue.

With that I yield to my colleague, the ranking minority member of the committee, Mr. Poshard, for any opening statement he may wish to make.

Congress of the United States
House of Representatives
 Washington, DC 20515-3703

Comments to the Subcommittee on Government Programs
In Support of HR 1863, the Employment Non-Discrimination Act

Mr. Chairman, thank you for your indulgence and consideration in allowing me to participate in this hearing. I have asked for this privilege because I care deeply about the basic rights of all people, including the right to work and be judged on one's job performance. In the past months, our attention has been focused on Judicial and Legislative branch actions in the area of gay rights. Summarizing the situation today, a Washington Post columnist wrote, "The Supreme Court ruling [which found that gays cannot be categorically singled out for discrimination] opened a door to possible change, but gays can still be denied a job, refused a mortgage or rejected for health benefits solely on the basis of who they return home to at night" (Liz Spayd and Bridgid Quinn, *Washington Post* 6/16/96) I am here today because we need to eliminate that insecurity, and I think ENDA is the best tool we have to do that.

This is not a new issue. Many of you know the long history of the national legislation to end discrimination based on sexual orientation. We have fought this battle for over twenty years in my own state. In 1973, I presided over first hearing in the Oregon Legislature on discrimination based on sexual orientation. We heard clear and convincing testimony that a problem existed and that a simple remedy would improve it.

Nearly twenty years later, the Portland City Council, in a unanimous vote, prohibited discrimination based on sexual orientation both in City employment and in private employment within the City. Our overwhelming support of the ordinance was based on the belief that such legislation was good for workers and therefore good for work:

- Job performance should be the sole measure of a person's fitness to work-- anything else hurts productivity.
- Improved morale attracts talented and dedicated employees who are secure in the knowledge that they cannot be discriminated against for who they are.

The City's ordinance and enforcement mechanism was created to work with pre-existing state statutes. The intertwining of our laws allows complainants to use the state administrative and court systems. Other cities, notably Philadelphia and Seattle, have chosen to create stand-alone laws and enforcement systems. Enforcement of the non-discrimination ordinance costs the City of Portland about \$20,000 per year. As in most Civil Rights cases, the 80/20 rule applies: about 80 % of the cases are found to be groundless, 20 % find evidence of discrimination.

The City's ordinance is a success. We find that:

- Employees recognize that the non-discrimination language protects ALL of them -- some cases of discrimination have involved speculation about the sexual orientation of a heterosexual employee.
- Clear standards and expectations in the City's ordinance have resulted in few complaints.
- This ordinance does not protect anyone inflicting unwanted sexual attention on their co-workers, regardless of gender or sexual orientation. There is no question that harassing behavior is unacceptable.

Though the Employment Non-Discrimination Act specifically excludes Domestic Partner Benefits, I believe that these benefits are important, and that there are other ways to approach their provision than through legislation. In the Portland area, employees at the City, the County, and the School District have demanded and negotiated domestic partner benefits to people in long-term, committed relationships. We were able to negotiate these benefits under existing contracts. While some of our unions objected to the initial contract because of concern over increased costs and an accompanying reduction in benefits, we were able to offset the minimal projected costs by restructuring other benefits. In April, 1995, 2% of the City of Portland's 5000 employees had enrolled for domestic partner benefits, at an annual cost of about \$200,000.

I strongly urge support for the Employment Non-Discrimination Act, and I look forward to hearing the testimony today.

STATEMENT BY
CONGRESSMAN JESSE L. JACKSON, JR.

COMMITTEE ON SMALL BUSINESS
GOVERNMENT PROGRAMS SUBCOMMITTEE
HEARING ON H.R. 1863,
THE EMPLOYMENT NON-DISCRIMINATION ACT

WEDNESDAY, JULY 17, 1996

THANK YOU MR. CHAIRMAN FOR THIS TIME. BEFORE I BEGIN MY REMARKS ON H.R. 1863, I WOULD LIKE TO THANK YOU, CHAIRMAN TORKILDSEN, FOR YOUR LEADERSHIP IN BRINGING THE EMPLOYMENT NON-DISCRIMINATION ACT FOR CONSIDERATION BEFORE THIS SUBCOMMITTEE. I WOULD FURTHER LIKE TO RECOGNIZE YOU AND THE 135 OTHER MEMBERS WHOM I HAVE JOINED IN COSPONSORING THIS BILL OUT OF A COMMITMENT TO THE PURSUIT OF EQUAL TREATMENT FOR ALL AMERICANS UNDER THE LAW, REGARDLESS OF THEIR SEXUAL ORIENTATION.

MR. CHAIRMAN, WE MUST CONSIDER E.N.D.A. AS THE CONTINUATION OF OUR NATION'S STRUGGLE AGAINST

DISCRIMINATION AND OPPRESSION. OUR FOUNDING FATHERS FIRST SAID "NO" TO DISCRIMINATION AND TYRANNY BECAUSE THEIR RIGHTS AS BRITISH SUBJECTS AND FREE MEN WERE REPRESSED BY A BRITISH MONARCH WHOSE TRANSGRESSIONS INCLUDED TAXATION WITHOUT REPRESENTATION AND ALSO THE DENIAL OF FREEDOMS OF RELIGION, SPEECH, PRESS, AND ASSEMBLY.

NEVERTHELESS, THOUGH THE FOUNDERS WERE WINNING THEIR WAR AGAINST DISCRIMINATION BY INCORPORATING THESE AND OTHER RIGHTS IN THE CONSTITUTION IN 1789, THESE FUNDAMENTAL RIGHTS AND PRIVILEGES WERE RESERVED FOR WEALTHY WHITE LANDOWNERS WHILE AFRICAN AMERICAN SLAVES WERE REDUCED TO THREE-FIFTHS OF A HUMAN BEING.

AS WE CONSIDER THIS CRITICAL PIECE OF CIVIL RIGHTS LEGISLATION, WE MUST BE FOREVER MINDFUL OF THE WORDS

OF CHIEF JUSTICE ROGER BROOKE TANEY IN THE CASE OF DRED SCOTT V. SANFORD WHEN HE STATED THAT AFRICAN AMERICANS WERE "AN INFERIOR CLASS OF BEINGS," AND THUS UNABLE TO BRING SUIT IN FEDERAL COURT.

MR. CHAIRMAN, E.N.D.A. WILL PROTECT AMERICANS IN THE WORKPLACE FROM BEING CALLED "INFERIOR" BECAUSE OF THEIR SEXUAL ORIENTATION. AND IT WILL BE AN AFFIRMATION OF THE RIGHTS OF ALL AMERICANS REGARDLESS OF THEIR RACE, RELIGION, GENDER, OR SEXUAL ORIENTATION. CLEARLY THE ADOPTION OF THE CONSTITUTION WAS ITSELF PART OF THE STRUGGLE AGAINST DISCRIMINATION -- NOT THE CULMINATION OF THAT STRUGGLE.

MR. CHAIRMAN, THIS BILL IS ONE PART OF CONTINUING THE STRUGGLE OF ALL AMERICANS AGAINST PREJUDICE AND DISCRIMINATION IN OUR COUNTRY. I QUOTE THE WORDS OF MRS. CORETTA SCOTT KING WHO STATED BEFORE THE OTHER

BODY ON JUNE 23, 1994: "I SUPPORT THE EMPLOYMENT NON-DISCRIMINATION ACT OF 1994 BECAUSE I BELIEVE THAT FREEDOM AND JUSTICE CANNOT BE PARCELLED OUT IN PIECES TO SUIT POLITICAL CONVENIENCE." MRS. KING THEN QUOTED THE WORDS OF DR. KING, "I HAVE WORKED TOO LONG AND HARD AGAINST SEGREGATED PUBLIC ACCOMMODATIONS TO END UP SEGREGATING MY MORAL CONCERN. JUSTICE IS INDIVISIBLE." HER CONCLUDING REMARKS INCLUDED THESE WORDS, "LIKE MARTIN, I DON'T BELIEVE YOU CAN STAND FOR FREEDOM FOR ONE GROUP OF PEOPLE AND DENY IT TO OTHERS."

MR. CHAIRMAN, I WOULD LIKE TO WELCOME ALL OF THE PANELISTS WHO HAVE COME TODAY TO SHARE THEIR INSIGHTS ON H.R. 1863, AND TO THANK YOU AGAIN FOR YOUR LEADERSHIP IN THE STRUGGLE AGAINST DISCRIMINATION BY HOLDING THIS HEARING. I THANK YOU FOR THIS TIME.

SUE W. KELLY
19TH DISTRICT, NEW YORK

COMMITTEE ON
TRANSPORTATION AND INFRASTRUCTURE
VICE CHAIR, SUBCOMMITTEE ON AIR/RAILROADS
SUBCOMMITTEE ON AVIATION

COMMITTEE ON SMALL BUSINESS
SUBCOMMITTEE ON GOVERNMENT PROGRAMS
SUBCOMMITTEE ON REGULATION
AND PAPERWORK

COMMITTEE ON BANKING AND
FINANCIAL SERVICES
SUBCOMMITTEE ON DOMESTIC AND
INTERNATIONAL MONETARY POLICY
SUBCOMMITTEE ON CAPITAL MARKETS,
SECURITIES AND GOVERNMENT
SPONSORED ENTERPRISES
ASSISTANT MAJORITY WHIP

Congress of the United States
House of Representatives
Washington, DC 20515-3219

Opening Statement
Honorable Sue Kelly
Employment Non-Discrimination Act

July 17, 1996

- PLEASE REPLY TO:
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Thank you, Mr. Chairman. As one of 137 bi-partisan co-sponsors, I would like to commend you for holding this important hearing on H.R. 1863, the Employment Non-Discrimination Act.

The Employment Non-Discrimination Act, or ENDA, is a very simple and straightforward piece of legislation. It would extend existing federal employment discrimination protections based on race, gender, religion, national origin, age, and disability to the sexual orientation of an individual.

Under ENDA, covered entities cannot subject an individual to different standards or treatment based on his or her actual or perceived sexual orientation. Furthermore, an individual cannot be discriminated against based on the sexual orientation of those with whom he or she associates. It is important to emphasize that ENDA does not confer any special rights to any group of individuals. Rather, it simply ensures that sexual orientation cannot be used as a means to discriminate in the workplace.

In addition to highlighting the significant things that ENDA does accomplish, it is also important to mention what the legislation does not do. It exempts employers with fewer than fifteen employees; it exempts religious organizations, including educational institutions substantially controlled or supported by religious organizations; it prohibits any quotas or preferential treatment based on sexual orientation, it does not apply to the armed forces; and it does not require an employer to provide benefits for the same-sex partner of an employee.

Several companies that are located in the district I represent have already instituted voluntary policies similar to the one ENDA would establish. One of these companies, Eastman Kodak, which has facilities located in my district, is represented at the hearing here today. I would like to welcome Eastman Kodak's representative, Mr. Michael Morley, as well as all of the witnesses that are with us this morning.

In conclusion, Mr. Chairman, ENDA is a very narrow piece of legislation that protects an historically targeted group of individuals from discrimination in the workplace. Discrimination in any form should not be tolerated. H.R. 1863 will help to end one form of it. Thank you.

*Comments of Congresswoman Millender-McDonald
on the Employment Non-Discrimination Act*

Thank you Mr. Chairman,

I want to thank the Chairman for bringing this bill before the subcommittee. I am happy to participate in today's hearing on the Employment Non-Discrimination Act. I am working to find ways to eliminate discrimination against workers from the work place and am proud to participate in this hearing.

Many employers have Non-Discrimination policies that include Sexual Orientation and that is because it is the right thing to do. This is the right time to enact the Employment Non-Discrimination Act, and I look forward to hearing the testimony of the witnesses.

Last week, 67 members of this body voted to oppose the Defense of Marriage Act. I was one of those members, Mr. Chairman. The Act was unconstitutional and the decision to recognize or not to recognize Domestic Partnership should have been left up to the states as they are better equipped to make those determinations. I cast my vote based on my core beliefs on principal. I will not engage in the hypocrisy that others are willing to succumb to for political purposes.

Mr. Chairman, I have a further commitment to the eradication of discrimination, of any type, in the work place. While the Employment Non-Discrimination Act has been drafted to address the concerns of the Gay and Lesbian

community, we would have to draft this legislation if we as a governing body and as a nation would adhere to the basic tenants of the Civil Rights Act of 1964.

If a person can suffer discrimination based on sexual orientation, how much more can an individual suffer discrimination based on ethnicity or gender. If we are to continue to grow as a nation, and separate ourselves from our invidious racial past, we must take a step forward, not to the side or backward. The Employment Non-Discrimination Act is a step in the right direction.

As we approach the dawn of a new century, let history judge us for our tolerance, not our hatred born in fear and ignorance.

TESTIMONY OF

MICHAEL P. MORLEY
SR. VICE PRESIDENT AND DIRECTOR, HUMAN RESOURCES
EASTMAN KODAK COMPANY

PAULA ALEXANDER
DIRECTOR, HUMAN RESOURCES
EASTMAN GELATINE CORPORATION

Regarding the Employment Non-Discrimination Act

U.S. House of Representatives
Committee on Small Business
Subcommittee on Government Operations
July 17, 1996

(MIKE MORLEY)

Mr. Chairman and Members of the Committee. On behalf of the more than 90,000 employees of the Eastman Kodak Company, I would like to thank you for the opportunity to share with the Committee our company's perspective on the issue of discrimination in the workplace. With me today is Paula Alexander, the Director of Human Resources for the Eastman Gelatine Corporation, a Kodak subsidiary located in Peabody, Massachusetts.

Kodak is the World Leader in Imaging. Quite simply, when people think of pictures, they think of Kodak. And our objective as a company is to see to it that all of our customers, from motion picture studios to photojournalists, records managers working with microfiche and digital storage, hospital regulatory labs, graphics designers, young parents, and even NASA, are able to capture what is in their mind's eye, and to Take Pictures. Further.

ENDA TESTIMONY

We have achieved and maintained our position as the industry leader in an increasingly competitive, global marketplace, by following two simple strategies: We provide to our customers the best value and highest quality products in the imaging industry, and we create an environment in which our employees can perform to their full potential. In the same way that we value each and every one of our customers, we also value each and every one of our employees.

Our corporate culture is founded on a set of fundamental Company Values that guide every action we take. Our company's mission statement begins with the following pledge: "We will build a world-class, results-oriented culture based on our five key values: Respect for the Individual; Uncompromising Integrity; Trust; Credibility; and Continuous Improvement and Personal Renewal. We believe that behaving according to these Values is key to achieving an environment in which people believe they are partners in the business, not just employees.

Our competitive position will clearly be strengthened by increasing understanding of the value of people's diverse opinions, on a global basis. Only with a diverse group of highly skilled people, working in a culture that enables them to apply their collective talents to shared objectives, will we consistently deliver the greatest value to the customer and, therefore, to our shareholders. A truly diverse global workforce will be our greatest strength in a fiercely competitive marketplace. These beliefs form the cornerstone for Kodak's commitment to diversity.

The Employment Non-Discrimination Act promotes this same orientation, and ensures a consistent policy of fairness in the American workplace. In keeping

ENDA TESTIMONY

with our statement of Company Values, in particular, Respect for the Individual, we have included sexual orientation in our non-discrimination policy since 1986. By recognizing the need to protect our gay and lesbian employees equally with the rest of our work force, Kodak joined a rapidly growing trend in corporate America. More than half of the Fortune 500 companies have instituted similar policies, and that number is growing steadily. Our non-discrimination policy has worked well. In the ten years since we included sexual orientation in our policy, its implementation has been accepted broadly, and we believe it has affected our bottom line for the better. Our gay and lesbian employees feel that they are equally protected and valued by the company. All of our employees understand that fairness and non-discrimination remain as fundamental values in our workplace.

It is our belief that ENDA is good for American business, large and small. The bill is in step with trends in the nation's most successful businesses, and is in tune with the fundamental sense of fairness valued by Americans. If we at Kodak felt that this bill were intrusive, expensive, or otherwise inappropriate for American business, we would not support it. But after a thorough analysis of its provisions, we are convinced that the Employment Non-Discrimination Act will have a positive impact on our country's ability to compete.

(PAULA ALEXANDER)

In my 25 years of experience at Eastman Kodak Company, I have found that fairness is fundamental to a productive workplace. Discrimination of any kind clearly runs counter to our Company Values and it threatens our business success.

ENDA TESTIMONY

At Eastman Gelatine Corporation we have a diversity initiative that is called "Workplace Chemistry." The goal is to create a work environment where every individual can work at their best by creating a culture of flexibility and sense of inclusion where all people feel wanted and appreciated. At Kodak, we have the responsibility to unleash talent by providing a work environment that motivates and supports employees in their effort to serve the customer.

To reflect our ongoing commitment to diversity, Kodak has taken a series of significant actions beyond the inclusion of sexual orientation in our non-discrimination policy. In 1992, the company officially recognized a network to support gay and lesbian employees - the Lambda Network at Kodak. This Network has been extremely effective in raising awareness of workplace issues related to sexual orientation. This has been accomplished by membership focus in two important areas: education and support. As an example, since its inception, the Lambda Network has directly impacted several hundred of Kodak's most senior managers through its Annual Management Educational Event. And, many hundreds of additional employees have been provided with education and support through numerous workshops, presentations, and other forms of direct interaction.

In fact, in part, it was through this education that we identified the need to assess our practices relative to health benefits. As a result, Kodak's U.S. benefit plans will allow coverage for domestic partners as of January 1, 1997. This represents our recognition that employees in domestic partnerships have the same needs

ENDA TESTIMONY

and face the same personal and family issues that these benefits are intended to provide for. Once again, we believe this action was the right thing for Kodak to do in order to be true to our commitment to diversity, our Company Values, and our non-discrimination policy.

As it is written, ENDA simply embodies the values already contained in our company's non-discrimination policy, as well as the principles already found in the nation's fundamental civil rights laws. Through those laws, we have agreed, as a nation, that our people should be treated fairly in the job market and the workplace. Our civil rights laws are in keeping with our country's founding principle that all people are created equal.

Unfortunately, those laws do not currently prohibit discrimination against people who happen to be gay or lesbian. The time has come to fill that void. The Employment Non-Discrimination Act is simply a logical extension of the fundamental value of fairness to an area that has been neglected for far too long. ENDA applies that basic standard to perhaps the most important of human pursuits, the ability to make a living.

While supporting employees, the bill also supports business by taking a narrowly tailored approach. It does not dictate the kind of benefits that must be offered to employees. It does not force a business to defend neutral practices which may have a disproportionate impact based on sexual orientation. In short, the bill is straightforward and fair. The right thing to do is to enact this bill as law.

ENDA TESTIMONY

In today's global marketplace, American business cannot afford to lose its edge. Businesses that drive away talented and capable employees are certain to lose their competitive edge. At Eastman Kodak Company, we have taken many measures to ensure this does not happen. Accordingly, as a successful American business and a responsible corporate citizen, Eastman Kodak Company enthusiastically endorses this important piece of pro-business and pro-civil rights legislation.

TESTIMONY

Elizabeth Birch
Human Rights Campaign

Before the Committee on Small Business
Subcommittee on Government Programs
July 17, 1996

Mr. Chairman and Members of the Committee. Thank you for the opportunity to testify today in support of the Employment Non-Discrimination Act. I am the Executive Director of the Human Rights Campaign, the nation's largest gay and lesbian political organization. I speak on behalf of the Human Rights Campaign, our more than 175,000 members nationwide, our friends and families, and the majority of fair-minded Americans who support us in our effort to win equal rights in the workplace.

Prior to assuming this position, I enjoyed a very successful and robust career in corporate America where I serve as head of litigation for a Fortune 100 company and General Counsel for one of its subsidiary companies. I have also had the privilege of assisting dozens of companies in instituting ENDA-type nondiscrimination policies. I have watched a number of the nation's finest companies and most prominent Chief Executive Officers come to the conclusion that to value the work of each individual, to attract talent from the broadest pool, to deepen employee motivation, commitment and loyalty and to honor the values of fairness and nondiscrimination on which this nation was founded -- in short, to run the best business possible -- there was simply no other wise choice but to institute such policies.

America is united as a nation by a simple but profound creed: That all people are created equal. These are simple words that speak profound truths. They provide clear direction for us as a society, and for you as lawmakers. Each American is to be considered of equal worth as a human being, and we should each be treated fairly, by our government, by our laws, and by each other. To secure democracy for posterity, to establish justice and ensure domestic tranquillity, all people must be assured of their basic, equal rights.

Today it is still perfectly legal under federal law to fire a person simply because he or she is gay, lesbian or bisexual. You can be fired in this country simply because you are gay. Let that sink in for a moment because it is reminiscent of other cruel, shameful moments in American history. That is why the Employment Non-Discrimination Act is necessary.

As the history of slavery and the civil rights movement makes clear, America has struggled long and hard to live up to the promise made in our country's founding documents. 220 years after the signing of the Constitution and the Declaration of Independence, we are still coming to grips with the difficult challenges that accompany our rich human diversity. Today, gay Americans, along with our families, friends and supporters, are still waiting to see this promise kept. What we know from other cruel and painful social struggles of the past, is that this promise must be kept, for when it isn't, it tears at the very heart, the core, the fabric of what holds the nation together in the first instance. This is the genius of the American form of democracy. Not that the founders were free from prejudice in every form, but that they created a body, a machine of truth that over time rejects toxic discrimination that undermines the basic humanity of the nation as a whole.

Mr. Chairman, let's make no mistake about it. This kind of discrimination happens in every region of the country. It strikes all kinds of workplaces and hurts all kinds of people. Some, straight and gay, actually endure violence and humiliation just for trying to do what is right. It is un-American. It is un-businesslike. And it is wrong. But it remains sanctioned by federal law, or rather by the absence of any law prohibiting it.

This committee has heard the stories of hard-working, honest people who did their jobs, paid their taxes and contributed to their communities – only to be singled out for brutal mistreatment on the job. But this bill is not just good for workers. It is good for business. You have heard from successful business leaders. In addition to enhancing the workplace in a variety of important ways, it imposes no costly mandates, dictates no quotas, and specifically prohibits special treatment on the basis of sexual orientation. In short, it is

simple legislation aimed at achieving a single end – fairness in the workplace, nothing more and nothing less.

We have seen Corporate America respond to the challenges of global competition and the changing nature of the workplace. And I am proud to say that American business is way ahead of Congress when it comes to ensuring the fair treatment of gay and lesbian people. A growing number of the Fortune 500 companies – about half – have instituted policies in line with the goals of ENDA. Successful companies that have actually endorsed this legislation come from a variety of industries. They include some of the best-known household names in American business, such as Quaker Oats, IBM, AT&T, Kodak, Nabisco, Xerox, and even Harley Davidson. Some of America's fastest growing success stories such as Microsoft, the Gap and Ben & Jerry's see such policies as standard business practices – part of valuing all employees.

Remember, to make the decision to institute such a policy a Chief Executive Officer has to consider the views of nongay employees, including those in field offices, the executive management team, the board of directors, shareholders and customers. And in each and every case, the decisionmaking journey has been the same: how can the value of Mary who is lesbian but also an incredible line worker or accountant be any less valuable than Fred who happens to be straight and works in operations. You see, these CEOs have concluded what most parents have concluded about their gay children: The world is enriched by their loyalty, contributions, labor and deep commitment to community and family. These CEOs have real human beings in mind when they make these decisions, not cruel and dehumanizing stereotypes.

What's more, the American people are also way ahead of Congress on this issue. When the Human Rights Campaign began commissioning polls on this topic a few years ago, we found that 74 percent of Americans, regardless of their political affiliation, support equal rights in the workplace for gay and lesbian Americans.

That number has grown steadily. In May of this year, a Newsweek poll found that 84 percent of Americans support equal rights in employment for gay and lesbian people. More recently, in

June an Associated Press poll found 85 percent of those surveyed favor this kind of legislation. As you can see, the vast majority of Americans share the values represented in ENDA.

This committee might be interested, Mr. Chairman, in the widespread support for this type of legislation from mainstream Republicans. In a poll of people who voted Republican in the 1994 elections, 64 percent said they support equal rights in the workplace for gay people. ENDA has been endorsed by Republican governors like Christine Todd Whitman of New Jersey and Bill Weld of Massachusetts.

Even Republicans as conservative as Senator Barry Goldwater have spoken in favor of this bill. Endorsing ENDA in the Washington Post, Senator Goldwater wrote, "There was no gay exemption in the right to 'life, liberty and the pursuit of happiness' in the Declaration of Independence. Job discrimination against gays -- or anybody else -- is contrary to each of these founding principles."

But what of those few who don't agree with these fundamental values? As Americans, we are all free to believe as we wish. But as citizens of a large, increasingly diverse nation, we must also accept certain responsibilities. Chief among these is the responsibility to treat each other fairly, with basic respect and common decency, even when we disagree. Without compliance to these civil virtues, our society could not function. We would find ourselves mired in endless conflict. Our glorious experiment in democracy would surely fail.

Despite the overwhelming public support for the principles behind ENDA, there are political groups here in Washington that oppose it. Unfortunately, these organizations exert undue influence on this Congress. They have attacked this simple piece of popular legislation in the same way that they have vilified gay and lesbian Americans -- with naked hostility, fabrications and distortions.

Perhaps the most deceptive of these is the spurious claim that gay and lesbian Americans want something called "special rights." As you well know, ENDA confers only the most basic, equal rights to everyone, regardless of their sexual orientation. None other than the Supreme Court of the United States has shown the "special

rights" rhetoric to be empty, meaningless, false -- and driven by animosity.

The Supreme Court's recent decision in Romer versus Evans overturned the only statewide anti-gay ballot initiative that has ever passed. Amendment 2 sought to deny Colorado citizens the basic protections offered by legislation similar to ENDA. In response to the "special rights" argument offered by the proponents of Amendment 2, the court wrote, "We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people, either because they already have them or do not need them. . . ."

Few public figures speak as clearly, eloquently and with such moral force on issues of civil rights and discrimination as Mrs. Coretta Scott King. Mrs. King spoke at the original Senate introduction of ENDA in 1994, saying, "For too long, our nation has tolerated this insidious form of discrimination against this group of Americans, who have worked as hard as any other group, paid their taxes like everyone else, and yet have been denied equal protection under the law."

Those words, and the testimony you have heard today, provide indisputable practical, philosophical and political reasons why this subcommittee should report favorably on ENDA, and why this Congress should pass this legislation. Mr. Chairman, working people need the protection afforded by ENDA. Most Americans support it. Most business people agree with it. And the values outlined in our nation's founding documents demand it

Thank you.

PROPOSED ADDITIONAL LANGUAGE TO SECTION 4 OF H.R. 1863 AS
SUBMITTED BY THE HON. TOM CAMPBELL, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF CALIFORNIA

Nothing in this Act shall be used by any court or any other agency of government, state or federal, to compel the use of sexual orientation except as a specific remedy with respect to an individual who has personally been found to have been discriminated against by reason of sexual orientation, and as a remedy for that instance of discrimination alone. Any other use of orientation by an entity covered by this Act is itself a violation of this Act, whether with the intent or the effect of creating a diverse environment, compensating for societal discrimination, or other supposedly benign purpose.

TESTIMONY

Brenda Cole
Board of Directors
Wainwright Bank & Trust Company

Before the Committee on Small Business
Subcommittee on Government Programs
July 17, 1996

Mister Chairman, thank you for inviting me here today to discuss my company's enthusiastic endorsement of the Employment Non-Discrimination Act. As a small, community-minded business, we at Wainwright Bank and Trust believe strongly that this legislation is in keeping with the values that have laid the foundation for our company's success. It is in line with the most up-to-date personnel practices followed by successful small businesses, who know that in order to stay competitive, we must deploy highly skilled professionals who are capable of working with all kinds of people in an increasingly diverse workplace and marketplace.

We currently employ 93 people at our headquarters and five branch offices in the Boston area. Deposits at our branches have grown by 300 percent in the last three years, with 70 percent of our new business referred to us by existing customers. In our first seven years of operation, our total assets reached 273 million dollars, making Wainwright the 14th largest commercial bank in the Boston area in terms of asset size. Wainwright's assets and market share continue to grow, thanks in large part to our well-considered approach to managing our most precious assets--our people.

Although the Bank was founded in 1987, its commitment to diversity goes back two decades earlier when our chairman and co-founder, Robert Glassman, was a 24-year-old platoon leader in Vietnam. With soldiers who were Caucasian, African-American, Latino, and Native American, his platoon represented the diversity of America. That this diversity was not reflected in the corporate board rooms of America helped shape the philosophy on which the Bank was founded.

An inclusive, community-minded approach guides all aspects and functions of Wainwright Bank's operations and growth. Our management refers to it as our "banking on values" policy. And we put our money where our mouth is. We finance affordable housing for all types of families, and underwrite community development in all types of neighborhoods. We contribute to organizations supporting women's rights and human rights, and particularly those that show a commitment to valuing human diversity. More than 50 million dollars of our depositors' money has been committed to financing projects such as homeless shelters; food banks; housing for men, women and children with AIDS; and breast cancer research.

Our staff reflects the diversity of our community and our customer base. It includes African-Americans, Asians, Latinos, and Caucasians; men and women; straight and gay, all working in various departments throughout the organization. Half of the banking officers are women, and fifty percent of the board of directors are women and minorities.

Our gay and lesbian employees have been extremely valuable team players. Eleven percent of our employees are lesbian or gay. Two of our five branches are managed by a gay man and a lesbian. A gay man has the enormous job of managing our rapidly growing credit card department. These employees work extremely hard and have performed extremely well. They are admired by their colleagues and well liked by their customers. Management considers them to be major assets to our company, and would not dream of treating them differently from anyone else.

We have unleashed the full productivity of our employees by ensuring that everyone is treated fairly, valued equally, and judged based on their performance -- nothing more and nothing less. It isn't just the business-like thing to do. It is the right thing to do.

Wainwright Bank also believes that passing the Employment Non-Discrimination Act is the right thing to do. This bill embodies principles that the vast majority of American businesses already comply with under the Civil Rights Act. There is nothing radical or even questionable in this legislation. It is clear, straightforward, and focused like a laser beam on an achievable objective -- which is equal treatment in the workplace for everyone. It places no burden on small business, it imposes no costs, and it dictates no quotas. In short, we agree with ENDA on both philosophical and practical grounds.

There are of course those who will disagree with us. They may rightfully ask why Congress should pass a law telling business people how to run their business. As a business person myself, I am also wary of inappropriate government intrusion in the marketplace. But I also know that, without basic ground rules, the marketplace could not function. Government has an appropriate role to play in establishing a level playing field in the job market. Government has a responsibility to ensure that every American enjoys equal opportunity in the workplace - if not an equal guarantee of success.

This principle is already well established in the law, and accepted in the private sector. In short, ENDA is the finest tradition of good government -- it upholds the values that make this country work, without imposing costly mandates that make our work harder.

Passing ENDA is the right thing to do -- and now is the right time to do it. On behalf of Wainwright Bank, our directors, managers, employees, and customers, I thank you for the opportunity to share our views with you today.

Testimony of Ernest Dillon

Detroit, Michigan

Small Business Subcommittee on Government Programs

July 17, 1996

My name is Ernest Dillon. I am grateful to this committee for inviting me to this hearing, and listening as I relay some ugly experiences that have changed my life considerably.

All of my significant employment has been in service to my country. I first joined the United States Marine Corps in 1974, and was honorably discharged after a full tour of duty. My civilian employment began with the Internal Revenue Service and the Veterans' Administration. In 1980 I began employment with the United States Postal Service. It was a good job at a place I'd always wanted to work.

I worked well with my coworkers. We were a very effective team, processing outgoing mail efficiently. Management was satisfied with my work performance and regular raises came in a timely manner. My first four years passed quickly.

In 1984, the atmosphere in my workplace began to change. A co-worker, with no provocation, suspected I was gay and began making anti-gay remarks to me. I had known him for a while, and his change in attitude confused me. For the people in my work unit, I was the same person I had always been -- a hard worker who never bothered anyone.

Whether or not I was gay had not been the topic of any conversation. I had always done my job, and I did it well. My sexual orientation had nothing to do with work. I kept work and my personal life separate.

The insults from this coworker soon escalated into more serious harassment. I repeatedly made management aware and my supervisors often witnessed the seriousness of my harassment. They neglected to act on this situation. To earn a living, I had to endure constant verbal abuse -- and try to keep focused while finding outrageous things about me plastered on the walls of the office and in the trucks. Nasty things, vulgar things, hurtful and hostile things.

My supervisor said there was nothing they could do about my situation until my harasser did something. Somehow, these degrading experiences were not enough. He had to do something more. He had to do something violent.

My union representative urged me to start keeping notes of the incidents, and I did that.

This torment had broken the spirit of the office and compromised our productivity. The harassment and hatred kept us from working as a team. It wasn't fair to me, and it wasn't fair to my coworkers. The hostility was becoming so intense, I frequently considered leaving my job.

But after much thought, I decided to stay. Being a black man from Detroit, I have seen bigotry before. I had been taught at a young age that you do not run from prejudice. You persist in the face of it. You work hard, you persevere, and eventually it pays off. More than anything else, I had been taught to believe that, in America, if you did your job well, you have a right to keep it.

Then one day, while on the job, my co-worker cornered me -- and I thought he would kill me. He

threw me on the floor, kicked me, and beat me until I was unconscious. He left me in a pool of blood. I suffered two black eyes, a severely bruised sternum, and gashes in my forehead.

When I regained consciousness, I staggered toward a supervisor who rushed me to the medical unit, and then the emergency room. I was sewn up, received medication, and spent three weeks recovering from my injuries.

When I finally returned to work, I was pleased to be working again, but scared to death. Although the coworker who had beaten me was fired, any relief I felt was brief. All of a sudden two other coworkers were now willing to pick up where my harasser left off. They too began leaving anti-gay messages at my work site. They also made slurs aimed at degrading me, both to my face and throughout the office.

I continued to notify my supervisors of these events. They acknowledged the patterns were the same, but again they could do nothing to stop the abuse.

I became imminently aware that, on my job, management would do nothing to protect me from another possible assault. I tried to just keep doing my job and not think about it.

But this harassment continued for three years. It kept chipping away at my spirit and soul. Then one day I received a death threat from one of my harassers. Fearing yet another violent incident, I went, trembling, to the staff nurse who told me to go home for the day. I called a therapist who advised me to get help. He removed me from that hostile work environment, and suggested I file a worker's compensation claim and initiate a case with the Equal Employment Opportunity office.

The EEO office accepted my case and I thought that something would be done to fix my work situation. I could not believe that people were allowed to torment you on the job -- and get away with it. While I had been getting my work done, the environment had gotten so dangerous that I feared for my life and my self esteem.

The discrimination was so intense it had forced me from my job. It just wasn't fair.

After the EEO investigation and hearings, the administrative panel ruled that I had been wronged. Then, the appeals began. After many months of anguish and anticipation, my case reached the 6th Circuit Court of Appeals -- who said that the law of the United States just did not protect me.

The judge said:

"Dillon's co-workers deprived him of a proper work environment because they believed him to be homosexual. Their comments, graffiti, and assaults were all directed at demeaning him solely because they disapproved vehemently of his alleged homosexuality. These actions, although cruel, are not made illegal by Title VII."

I turned to my union, my supervisors, my doctor, and the court -- only to find that in America I am not entitled to be able to work without fearing for my life. I am not entitled to equal protection. Well that's just wrong. That's not how I was raised -- that is not what I was taught to believe in.

Something has to be done -- and soon.

I have now gone back to work for the post office, but at a different branch. Luckily, I have not had to endure intolerable harassment or discrimination. But without a federal law prohibiting this kind of discrimination, my job, my livelihood, and my safety, is only a matter of luck.

I finally turn to you, the lawmakers of this country. Please help me and the thousands of other Americans who suffer discrimination.

We want what every other American wants -- the equal opportunity upon which this great country was founded, the ability to work, to be treated fairly, to be judged by our performance and abilities, and to be free from discrimination and harassment. I look to Congress for leadership in stopping the pain and prejudice, to give to me and thousands of Americans the secure right to live the American Dream. I ask that you pass the Employment Non-Discrimination Act to protect us from this kind of discrimination.

Thank you.

TESTIMONY

Todd M. Dobson
Dorchester, Massachusetts

Before the Committee on Small Business
Subcommittee on Government Programs
July 17, 1996

Mister Chairman and Members of the Committee. Thank you for inviting me here today. I would also like to thank my mother and niece for attending today's hearing with me.

I was brought up to believe in the fundamental values of hard work, fair play, and helping others. I believed that as long as I worked hard and did the best job possible, I would be valued by my employer. I believed that if I were ever treated unfairly, the law would protect me. I am coming to you to make sure the law protects everyone who feels the same way.

Unfortunately, I have learned from painful experience that these values are not necessarily shared by everyone. You can do a good job, play by the rules and give your utmost to your company -- and still suffer the effects of discrimination.

Another value I was taught, was to give of myself to help others. Boston is well known for its generosity to the less fortunate. Boston hosts a large number of public events to raise money for the poor, help people with AIDS, fight hunger, and other worthy causes. I have walked, run, bicycled, danced and even rollerbladed to raise money for people in Massachusetts.

I tell you all this, because it was my effort to help men, women and children with AIDS that led to me losing my job. I appreciate this opportunity to share my story with you in hopes nobody must endure what one company did to me.

I started my own computer consulting business in 1992, which I ran quite successfully for two and a half years. My business thrived, and my time was booked months in advance.

I came back to Boston to finish my college degree and despite my success as a businessman I decided to leave my business and get a job that would allow me to go to school and obtain an undergraduate degree in Management Information Systems.

Before long, I had job offers from four companies. One of them, a software company, won me over by promising me the flexibility to go to school at night. They hired me for their technical support staff. I provided technical assistance to experienced network engineers and administrators at some of the largest corporations in the United States. Our client list was like a Who's Who of Corporate America, even the White House.

While I worked at my job, my employer repeatedly told me that I was doing a good job. He said I was meeting all his expectations, and then some. I never heard a negative comment from him about my work.

I was also well liked by the majority of my fellow employees. When I asked coworkers to sponsor me in last year's Boston to New York AIDS Ride, they contributed a total of \$1200.00 dollars. It really made me feel good to know that most of my coworkers supported my volunteer work, and found it in their hearts to give so generously to a cause that mattered a lot to me.

I worked closely with a fellow consultant named Bob. We worked together in the server room and actually shared the same office. Part of his job was to train me on products that I would need to master in order to serve our clients. He did his job, trained me, and everything was fine. I never talked about my personal life, and he didn't ask me about it.

Things were fine until the AIDS dance-a-thon three months after I was hired. After Bob found out about my participation in that event, he began to distance himself from me. Overtime, he refused to work in the same office with me. He stopped training me and started avoiding me. This behavior was very subtle and continued to progress as time moved on.

His behavior progressed for many months, and you can imagine that this atmosphere of hostility made it difficult for me to do my job. When I began fundraising for the Boston to New York AIDS Ride, which attracted over 3200 riders who biked hundreds of miles to raise money for men, women and children with AIDS, I sent an email around the company explaining the event and inviting people to support me.

From that moment on, Bob began harassing me. He said everything I did was wrong. He refused to even be in the same room with me. And one day, I walked into the server room just in time to hear Bob tell another employee that I was - quote - "just a faggot, you can't expect anything from him".

I spoke repeatedly with the Director of Human Resources at Information Access Company about Bob's behavior; Gill simply shrugged and said that there was nothing he could do. Nevertheless, I kept Gill informed of the fact that Bob's behavior was interfering with my ability to do my job.

Bob had no more seniority than I had at the company, but he was a close personal friend of my boss. They had known each other for over 15 years. On several occasions, after my boss told Bob that he had to do his work in our office, I observed the two of them in heated conversations. Bob did not come back to the office.

Over a period of six months, I repeatedly asked by boss for a formal performance review. I was repeatedly denied one. Because Bob was not doing his job, I asked for the training that I needed. I never got it.

In the end, it became clear that Bob was simply not willing to work in the same company with me. My boss was put in the position of choosing between us. In November of 1995, he fired me. At the time, no one would tell me the reason for my termination.

There is only one reason for the mistreatment I have suffered -- that reason is discrimination. I am sure that if it weren't for the prejudice of my coworker, I would be working for them today.

After losing my job, I had trouble paying the mortgage on my home. Perhaps more important to me, I lost the chance to finish my education. Now I'm just trying to make ends meet and cover my mortgage. It will be many years before I find another opportunity to go back to school. That loss weighs very heavily on me.

I've been through a lot in my life. I am not considered to be a weak person. But I must tell you that this episode has hurt quite a lot. I was judged for a reason that has nothing to do with my talents and abilities as an employee. I was treated unfairly simply because someone else had a problem with a small part of my life.

I'm here today to ask you to ensure that this sort of mistreatment doesn't happen to other Americans. The Employment Non-Discrimination Act would give people basic protection against this kind of discrimination, and it would give people a place to go when they feel they've been treated unfairly.

Because Massachusetts has a law like ENDA, I had a place to go, and I am getting a fair hearing from the Massachusetts Commission Against Discrimination. But because this type of discrimination happens everywhere in America, the same kind of protection is necessary in all 50 states. I would ask you to approve the Employment Non-Discrimination Act, and support the values of hard work and fair play that helped make this country great.

Thank you.

Michael T. Duffy, Chair Commissioner of the MCAD
 Testimony before the:
 Subcommittee on Government Programs
 Committee on Small Business
 United States House of Representatives
 B-363 Rayburn House Office Building
 Washington, DC 20515

Testimony on ENDA 1995

Chairman Torkildsen, and members of the Subcommittee in Government Programs: Good day, my name is Michael Duffy and I am the Chair Commissioner for the Massachusetts Commission Against Discrimination (MCAD), and a member of the Weld-Cellucci Administration. I speak today not only as a gay man who is also an active member of the Republican party, but as an American who does not see this as a partisan issue, but as one that involves all Americans interested in creating a just society. The Commission has been responsible in enforcing the 1989 Massachusetts statute that protects gays and lesbians in the workplace. It is also the chief civil rights enforcement agency for the Commonwealth of Massachusetts. With this unique position I hope to address some key issues on this important topic.

What direction is the United States going to take on this issue? Years ago a heroic movement began and was directed toward wiping out oppression, and actual acts of violence. Swastikas, broken arms, and the threat of physical violence, these were the objects of discrimination that our country took aim at. These were the types of workplace conditions that Title VII attempted to eliminate in 1964. This is not to say that the Congress or President Johnson naively thought that these conditions would fantastically disappear once Title VII was enacted, but with this legislation our government made an economic commitment to create a socially just society. It made a commitment to Black and White Americans, Catholics, Jews, women, minorities and the majority. What the Federal Government of these United States did was make a commitment to all Americans, saying that we as a people would not tolerate discrimination in the workplace. We as a people stand firmly together in one pluralistic society ready to defend one another.

Yet what of the lesbian or the gay man? Somehow in this great endeavor they slipped out of view, and as a result the promise of 1964 has not been completely fulfilled. In many parts of our Union those conditions that I spoke of at the beginning are still endured by Americans. They have not received civil rights protection from their own government. A qualified doctor can be denied a position simply because he is gay. A carpenter can be physically assaulted and humiliated because she is gay. A janitor attempting to support himself can be harassed and have swastikas carved on his locker, and our Federal Government will turn its head away simply because he is a gay man. One begins to think that Justice is not so blind.

Massachusetts has attempted to rectify this unjust situation. Through bold leadership, Massachusetts has made government responsive to all Americans, and not just those who are perceived as being heterosexual. The doctor, carpenter, and janitor all have protection simply because they live within the boundaries of Massachusetts, but if they were to travel outside of Massachusetts it would be like a Black American taking a time machine forty years into the past. All these protections vanish away. Strange to think that a state boundary can change a person from a citizen into a second class citizen.

Does the homosexual really need legal protection to secure his full citizenship? Does the doctor, carpenter and janitor really get discriminated against? If they do what is the issue?

A great deal of interest in sexual orientation discrimination has sparked a number of studies. In a paper reported by the *Harvard Law Review*, "[n]early one-third of all gay men surveyed reported being discriminated against in some form on the job, and seventeen percent reported having lost or having been denied employment because they were gay. Similarly, nearly one-quarter of lesbians surveyed reported that they have been discriminated against in the workforce."¹ Since 1990 until May 16, 1996 the MCAD has

¹Editors of the *Harvard Law Review*, *Sexual Orientation and the Law*, (Cambridge: Harvard University Press, 1989) p. 65

had 683 cases filed, and that is under a six year period. Out of the 683 cases filed under sexual orientation 552 were employment cases. While public and private accommodations are a rising category within sexual orientation discrimination, employment continues to dominate the field in which homosexuals are discriminated against. My belief is that the level of discrimination is much higher in all areas, but that homosexuals are afraid or just unaware of the current protection. This belief is supported by the above mentioned study, and the entire history that surrounds this issue.²

Earlier on in our discussion I mention three occupations: A doctor, a carpenter, and a janitor. These three are examples of real cases that were brought before the MCAD. The case of the doctor and carpenter are examples of files that were settled before public hearing, while the case of the janitor is an example of one that made it all the way to a public hearing.

The doctor is a man named Frederic Cantor who is an anesthesiologist. The carpenter is a woman named Louise Vera, and the janitor is a man named Leon Magane. These are three individuals who demonstrate the diversity of the MCAD's sexual orientation case load. They represent different economic classes, different regions of the state, and different forms of discrimination, but they share the status of being gay. Their stories tell that any gay person is vulnerable to discrimination.

Dr. Cantor's case is an example of a gay individual being denied employment simply because his sexual orientation does not meet the norm. During the recruitment process at Malden Hospital, Dr. Cantor was given an offer of employment, that was made on the condition that his references cleared the screening process. Although Dr. Cantor was only required to have three references, and two were supposed to be from his field, he supplied six. Four of his six references gave high remarks to the recruiter, Dr. Anil Kumar,

²Homosexuals traditionally held the position of being victims of the law rather than protected by the law. Some theories maintain that for these reasons some homosexuals are not prone to use legal institutions to access their rights. However, once the homosexual person and government reestablish a political relationship a greater trust should develop between the two groups.

who had been actively pursuing Dr. Cantor. Two of these four were the crucial two that the hospital required, because they both were involved in the Dr. Cantor's field.

Dr. Kumar, however, overstepped the fair playing ground when he began to inquire about Dr. Cantor's sexual orientation. He asked Dr. Aldredge, a co-worker of Dr. Cantor, whether Dr. Cantor was a homosexual. It was clear that Dr. Kumar unfairly increased the scope of his employment investigation.

Dr. Aldredge replied that Dr. Cantor was indeed a homosexual, but he did not think that this fact ever figured into Dr. Cantor's abilities.

Dr. Cantor's offer of employment was rescinded on the basis that his references fell through, even though the only two doctors who gave poor remarks were not in Dr. Cantor's field, and only vaguely knew him in the first place. In the investigation the Commission issued a probable cause finding crediting Dr. Cantor's allegation that he had been discriminated against. A settlement was reached between him and the hospital.

The Cantor cases is an example of discrimination that is subtle, and covered under the niceties of the professional world. It is also a sign that discrimination can occur in areas of employment that are traditionally thought of as being more tolerant than other workplaces. Discrimination is found everywhere, but some industries are more mindful in covering it up than others. The next two cases are not as subtle. The discrimination is blatant and direct.

The complainant, Louise Vera, was employed by Smith College and is a member of the Brotherhood of Carpenters and Joiners, Local 108. The union supervisors and members harassed, demeaned, threatened, and physically assaulted Ms. Vera because she was a lesbian. The physical violence that occurred on March 14, 1991 is an example of the unsafe work conditions that gays and lesbians face on a daily basis. It is the direct result of the lack of full governmental protection on this issue. However, some may say that this cannot be the case, after all, if government protection was all that was needed to secure

the rights of gays and lesbians, then there would be no discrimination in states like Massachusetts.

This objection does not fully deal with the issue. Government cannot wipeout discrimination with legislation, but what does happen is that government influences the culture and says that this type of behavior is unacceptable. It does not affirm or deny any lifestyle, but it does affirm the value of the human person.

Leon Magane was an employee for a real estate company in Worcester, Massachusetts. During the time of his employment he was the janitor for Corcoran Management Company. On several occasions during his employment Mr. Magane found male pornographic pictures taped to his locker. Later he found a swastika carved on his janitorial closet. During the evening he received harassing phone calls at his home. He was humiliated and dehumanized by having gay personal advertisements placed on his locker. His supervisor, Mr. Monahan, began telling Magane's residents and contractors that Magane was gay. Mr. Magane made it clear to Mr. Monahan that he did not want his sexual identity to be public knowledge. Interestingly enough, it was Magane, and not his supervisors that wanted his sexuality to remain private. Magane did not see any reason why his sexual orientation involved his job duties.

Monahan continued to torment Magane by asking him his sexual practices, personal questions about his partners, making obscene sexual gestures, and saying derogatory comments to Mr. Magane.³ When Magane complained to his management, they simply said it was beyond their control. Finally Magane sought the advise of legal counsel, and his attorney asked the company to conduct an investigation into the matter. Rather than immediately seek the help of government, Magane attempted to solve the matter internally.

³Some of these comments including Monahan asking Magane the size of his lovers penis, and calling Magane a "lollipop licker", "pike smoker", "pole sucker", and then making statements like, "Lee, he's a friend of mine. He'll blow me any time."

The company finally responded by conducting an investigation. However, during the investigation Magane was verbally warned that if Monahan was fired he would break his legs. At this point, believing himself to be in physical danger, Magane resigned and brought his case to the Commission. Subsequently, Magane was hospitalized for emotional problems attributed to the harassment made by his co-workers.

Neither Dr. Cantor nor Mr. Magane ever made their sexual orientation an issue in the workplace, but it was the hospital's recruiter and Magane's co-workers that made these men and their sexuality the issue. What I have found in most cases filed at the Commission is that it is generally not the case that a gay or lesbian employee brings their sexual orientation into the workplace. Dr. Cantor's and Mr. Magane's experiences are more the rule than the exception. This is not to say that sexuality is never a public issue, or that employees have a duty to keep their private lives outside the workplace, because we know that the heterosexual worker does not carry this same duty, but simply to dispel any false stereotype that homosexuals flaunt their sexuality unnecessarily.

Secondly, those homosexual complainants who bring their cases to the Commission do not announce their sexuality once they enter the workplace door. They are usually discovered or they simply let their guard down. They do not say, "Here I am, a homosexual, I demand special treatment." I feel that Dr. Cantor's, Ms. Vera's and Mr. Magane's cases exemplify the Commission's sexual orientation cases on this matter. It was only after his employer began to inquire about Dr. Cantor's private life that his sexuality even become an issue. It was only after Mr. Magane was harassed that his sexuality ever became an issue. In my experience someone either accidentally discovers the complainants sexual orientation, or the complainants are hunted and uncovered.

It is my observation that many gay men and lesbians, even when they are victims of workplace discrimination, are reluctant to come forward and file complaints. Reluctantly, because for many gays and lesbians filing involves coming out of the closet to their families and friends. Further, the whole process exposes some of the most intimate details

of their lives. Yet a fair amount of people are discriminated against to such levels that they feel the necessity to go through the whole process. The Commission's research has discovered that complaints, especially in the rural regions of the Commonwealth, usually experience horrendous levels of discrimination before they file a case at the Commission.

Also, judging from the numbers of cases that have been filed at the Commission one can safely assume that gays and lesbians are not currently abusing the system. Only 2% of the MCAD's current case load involves the sexual orientation statute. If one considers that gays and lesbians represent 10% of the population, then this 2% figure is quite low.

The need for this type of legislation is clear, therefore I urge you to enact this important bill.

Appendix:

1. Governor Weld's letter of support
2. Magane decision
3. Vera probable cause finding
4. Cantor probable cause finding
5. MCAD's sexual orientation case load from 1990-1995

Appendix One:

Governor Weld's letter of support



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE DEPARTMENT

STATE HOUSE • BOSTON 02133

(617) 727-3600

WILLIAM F. WELD
GOVERNORMARGO PAUL CELLUCCI
LIEUTENANT GOVERNOR

July 10, 1996

The Honorable Peter G. Torkildsen
Chairman
Subcommittee on Government Programs
Committee on Small Business
United States House of Representatives
B-363 Rayburn House Office Building
Washington, DC 20515

Dear Representative Torkildsen:

I am writing to express my unequivocal support for H.R. 1863, the Employment Non-Discrimination Act of 1995. I understand that the Subcommittee on Government Programs will address this bill on July 17, and am pleased that Michael Duffy, Chairman of the Massachusetts Commission Against Discrimination, will testify on behalf of the Weld-Cellucci Administration.

As you know, I have overseen the vigorous enforcement of civil rights statutes that ensure equality of opportunity in the workplace for gay men and lesbians in Massachusetts. Passage of the Employment Non-Discrimination Act of 1995 is vital to provide every American the same opportunity.

Thank you for your continued leadership on this important issue.

Sincerely,

A handwritten signature in cursive script that reads "Bill Weld".

William F. Weld

Appendix Two:
Magane decision

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

LEON MAGANE,
Complainant

v.

DOCKET NO. 93-WEM-0120

CORCORAN MANAGEMENT COMPANY,
Respondent

Appearances:

Gary H. Goldberg, Esquire for the Complainant
David G. Hanrahan, Esquire for the Respondent

DECISION OF THE HEARING COMMISSIONER

I. PROCEDURAL HISTORY

On June 17, 1993, Complainant Leon Magane filed a complaint with this Commission in which he charged Respondent Corcoran Management with discrimination on the basis of sexual orientation. On November 22, 1994, the Investigating Commissioner found Probable Cause to credit the allegations in the complaint. Attempts to conciliate the matter failed and the case was certified for public hearing on January 19, 1995. A public hearing was held before me on December 11 and 12, 1995. At the hearing, Complainant presented

a motion to amend the complaint to add a claim for retaliation. The motion was denied. Having considered the post hearing submissions of the parties and the entire record before me, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant Leon Magane resides in Worcester, Massachusetts. He is a gay man. In March, 1990, Complainant was hired by Respondent as a janitor. He was initially assigned to work at the Shrewsbury Commons Condominium complex. In the spring or summer of 1991, Complainant's hours at Shrewsbury Commons were reduced. As a result, he worked mornings at Shrewsbury Commons and afternoons at Stratton Hill Apartments. (T I, 26,28,50,52)

2. Respondent Corcoran Management Company, Inc., is a real estate management company, managing the residential housing properties at Shrewsbury Commons and Stratton Hill Park. Brian Earls was Complainant's immediate supervisor at Shrewsbury Commons and Michael Monahan was his immediate supervisor at Stratton Hill. Jim Reed was property supervisor at Shrewsbury Commons from March, 1991 through July 1991 and at Stratton Hill Park from March 1991

through December 1991. Nancy Gaudet was the property supervisor at both sites from 1991 through June 1993. (T I, 55-56, 142-43, 182)

✓ 2. In October, 1990, Complainant discovered a pornographic picture of a nude man taped to his locker at Shrewsbury Commons. He reported the incident to rental agent, Brian Collins. (T I, 39)

✓ 3. In 1991, Complainant reported to management that a second pornographic photograph of a nude man was taped to his locker, and that a swastika was carved on the door to his janitorial closet. (Also at this time the Complainant began receiving harassing telephone calls at home.) (T I, 41)

✓ 4. In November, 1991, a newspaper personal ad seeking a "gay white male" was taped to his locker. Complainant complained to management about the clipping and requested a transfer. His request was denied. (T I, 59-63)

5. Jim Reed, the property supervisor at Shrewsbury Commons, advised Complainant to contact the police about the harassing telephone calls. Reed convened a meeting of employees in late summer or early fall of 1991 to discuss the incidents described

above. (T I, 145)

6. Sometime in 1991, Michael Monahan became Complainant's supervisor at Stratton Hill Apartments. Joanne Mangeson was the recreation director and Katherine Garrity was the rental manager. All three were aware of Complainant's sexual orientation. (T I, 115-16)

7. Complainant ate lunch daily with Garrity, Mangeson and Monahan in the Stratton Hill recreation room. At these lunches, the participants, including the Complainant, engaged in discussions that occasionally included references to sex. These sexually explicit discussions were confined to the luncheons, and continued on a daily basis until Complainant resigned in June, 1993. (T I, 116, 119, 122-23, 125)

8. In March or April 1993, Garrity told Complainant that Monahan was telling residents and contractors that Complainant was homosexual. Complainant testified that he told Monahan that he did not want his sexual orientation discussed outside of his group of co-workers. (T I, 68)

✓ 9. Complainant testified that Monahan asked him about his sexual practices, the size of his lover's penis and the specific sexual acts Complainant engaged in. He stated that Monahan once stood behind him and blew in his ear. Complainant further testified that Monahan called him "lollipop lick" "pike smoker" and "pole sucker". He also greeted him with the words "Hi, sexy." and once stated ("Lee, he's a friend of mine. He'll blow me any time.") Complainant testified that Monahan often feigned masturbation or oral sex when he passed Complainant in the hallway. This conduct occurred outside of the lunch-time discussions and Complainant repeatedly told Monahan to stop the conduct. (T I, 69-75, 78-79) Monahan denied making any sexually harassing comments, but he acknowledged greeting Complainant with the words, "Hi, sexy" (T I, 213-14) I credit Complainant's testimony and do not credit Monahan's testimony to the extent that he denied making the offensive comments.

10. On May 19, 1993, Complainant met with Nancy Gaudet at Shrewsbury Commons for the purpose of discussing his performance. At the meeting Complainant complained to Gaudet about the sexually offensive comments by Monahan. According to Complainant, Gaudet responded that it was out of her hands and that he should take care

of it himself. Gaudet denied having discussed the issue. (T I, 197-98) The conversation continued with a discussion of Complainant's performance. (T I, 76-78) I credit Complainant's testimony. I do not credit Gaudet's testimony that Complainant did not raise the issue of sexual harassment at this meeting.

11. Following the meeting with Gaudet, Complainant sought the advice of counsel, who advised him to keep a written record or any offensive remarks made to him by Monahan. Subsequently, Complainant noted some of the remarks made by Monahan. (C-9)

12. Complainant authorized his attorney to send a letter to Respondent requesting an investigation into Monahan's conduct. (T I, 83-84) The letter was not offered into evidence. Other evidence in the record indicates that the Respondent began an investigation following receipt of the letter. A meeting of all parties was scheduled for June 17, 1993 to attempt to resolve the matter.

13. Complainant testified that in June 1993 he had a conversation with a co-worker, Timothy Hawkes, who told him, "I heard about the investigation going on, and Mike Monahan said he'd

break your legs if he lost his job." (T I, 85)

14. Complainant testified that he was afraid for his safety following this conversation with Hawkes. He contacted his attorney, who drafted a resignation letter for him, dated June 16, 1993. Complainant resigned effective June 16, 1993. (T I, 85-86; C-10)

15. Complainant testified that while employed by Respondent, in 1993, he suffered from panic attacks, involving shortness of breath, sweating and weakness. These attacks occurred two or three times weekly. (T I, 82-83) In August, 1994 Complainant was hospitalized for two weeks for emotional problems, including heavy drinking.

III. CONCLUSIONS OF LAW

A. HOSTILE WORK ENVIRONMENT

M.G.L. Ch. 151B sec. 4 prohibits discrimination on the basis of sexual orientation and prohibits harassment on the basis of sexual orientation.

Sexual orientation harassment, which creates an intimidating, hostile, humiliating sexually offensive work environment, is demonstrated by showing: (1) that Complainant was subjected to sexual comments or other verbal or physical conduct of a sexual nature; (b) that this conduct was unwelcome and (c) that the conduct complained of was of such a nature that it would make the employment significantly less desirable to a reasonable person in Complainant's position. Gnerre v. MCAD, 402 Mass. 502, 507 (1988), Smith v. Brimfield Precision, Inc., 17 MDLR 1089, (1995). If a hostile work environment is found, it must be determined whether the employer took adequate steps to remedy the situation. College-Town Division of Interco, Inc. v. MCAD, 400 Mass. 156, 166 (1987).

Complainant testified that he was harassed and ridiculed because of his sexual orientation by Monahan, his supervisor, from December 1992 through June 1993. Complainant's testimony was supported by Garrity, the Rental Manager at Stratton Hill Apartments. Complainant testified that he asked Monahan several times to discontinue his offensive conduct. Monahan denied making any comments outside the lunchroom regarding Complainant's homosexuality. Monahan's testimony was credibly rebutted by Complainant and Garrity. Garrity credibly testified that she heard

Monahan belittle Complainant and also heard from others who had witnessed Monahan engaged in similar conduct.

Complainant does not allege that the lunch room banter was the basis for his claim of hostile work environment. There was no testimony that the lunchroom banter was taken outside into the work environment by Complainant. Complainant's complaints were timely, as evidenced by his telling Monahan to cease his harassment, informing Garrity of the harassment and advising Gaudet of the harassment while it was occurring. I did not credit Monahan's testimony denying that he made offensive comments to Complainant.

Respondent asserts that Complainant's willing participation in the lunchtime discussions about heterosexual and homosexual sex, indicates that the conduct complained of was not unwelcome. I disagree. When Monahan made Complainant's sexual orientation the subject of ridicule outside of the lunchtime conversations and Complainant objected to the conduct, it was no longer welcome, and constituted unlawful sexual harassment. The present case is more analogous to Couture v. Central Oil Company, 12 MDLR 1401 (1990), in which the complainant worked for Respondent during four separate periods of time. Couture alleged that she had been sexually

harassed during each period of employment. The Hearing Commissioner found that the conduct during the first three periods of employment was not sexual harassment because Couture did not object at the time. When the conduct escalated to touching during the forth period of employment and complainant told her employer to stop, the conduct was found to be unlawful sexual harassment. Likewise, in this case Complainant in this case consented to and participated in the lunchtime discussions about sex. However, once Monahan made Complainant's sexual orientation the subject of ridicule, it posed a barrier to Complainant's full participation in the work place and became unlawful sexual harassment.

I conclude that Monahan's conduct created a hostile work environment for Complainant in violation of M.G.L. Ch. 151B. M.G.L. Ch.151B. Monahan was a supervisory employee, therefore, Respondent is strictly liable for his conduct. College-Town Division of Interco Inc. v. MCAD, 400 Mass. 156, 165 (1987).

The incidents which took place in 1991 involving the explicit photographs, the gay personal ad and the swastika all occurred at Shrewsbury Commons and were all reported to management. These all

contributed to an environment at the workplace that should have caused the Respondent to take Complainant's complaints of harassment more seriously.

B. CONSTRUCTIVE DISCHARGE

Complainant alleges that he resigned as a result of a threat made by Monahan and relayed to a co-worker to "break his legs" and because he feared for his safety on the job. He asserts that he was constructively discharged. In order to establish constructive discharge, the employee must show that conditions were so intolerable that a reasonable person in the employee's position would be compelled to resign. Patrickson v. Westvasco, Envelope Div., 15 MDLR 1642, 1662; Jorge v. Silver City Dodge, Inc., 15 MDLR 1518, 1532 (1993); Norman v. Andover Country Club, 15 MDLR 1395, 1419 (1993); Estate of Douglas McKinley v. Boston Harbor Hotel, 14 MDLR, 1226, (1992) He must also demonstrate that he has exhausted all of the alternatives to leaving employment. Estate of McKinley, supra, at 1241-42.

I conclude that Complainant has failed to establish a case of constructive discharge. I find that Complainant did not act

reasonably in tendering his resignation. The "threat" made by Monahan was not made directly to Complainant. The "threat" was relayed to him by a co-worker and Complainant did not inform Respondent of the threat or request that action be taken. Moreover, the Respondent had begun an investigation into Complainant's allegations, which was to include a scheduled meeting among all parties. Complainant resigned the day before the meeting was to take place. Thus I conclude that Complainant had not exhausted all of his alternatives, and that his conditions of employment were not so intolerable that a reasonable person would have tendered his resignation.

For the above reasons, Complainant's charge of constructive discharge is dismissed.

IV. REMEDY

Upon a finding of unlawful discrimination, the Commission is authorized to grant remedies to effectuate the purposes of M.G.L. Ch. 151B. Such remedies may include damages for emotional distress. Complainant testified credibly that he suffered from two or three panic attacks each week during the last several months of his employment, and that he was later hospitalized for emotional

problems. I conclude that Complainant suffered from emotional distress as a result of the sexual harassment by Monahan. I find that Complainant is entitled to an award of \$150,000.00 in emotional distress.

Because I have found in favor of the Respondent on the claim of constructive discharge, an award of back pay damages is not warranted.

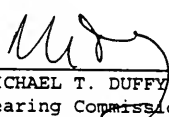
V. ORDER

Pursuant to the authority granted the Commission under Massachusetts General Laws, Chapter 151B, Section 5, it is ordered that:

(1) Respondent pay to Complainant Leon Magane the amount of \$150,000.00 in damages for emotional distress, plus interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such date as payment is made or until such date as this obligation is reduced to a court judgment and postjudgment interest begins to accrue.

Any party aggrieved by this Decision may file a Notice of Appeal to the Full Commission within ten days of receipt of this Order and a Petition for Review within thirty days of receipt of this order.

SO ORDERED this 6th day of June, 1996.



MICHAEL T. DUFFY
Hearing Commissioner

Appendix Three:

Vera probable cause finding

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

LOUISE VERA,
Complainant

VS.

BROTHERHOOD OF CARPENTERS,
LOCAL 108, ET AL
Respondents

ORDER

DOCKET NO: 91 SEM 0395

PROCEDURAL HISTORY

The procedural facts of this matter indicate that the above captioned complaint was filed on July 31, 1991, alleging, *inter alia*, discriminatory terms and conditions of employment and harassment based on sex (female) and sexual orientation (gay) in violation of G.L. c. 151B § 4(1), (4A), and (5). Following an investigation, this Commission found probable cause to credit the Complainant's allegations, in part, on December 23, 1993. Specifically, probable cause was found to credit the allegations against Local 108. A conciliation conference was held on the matter on April 27, 1994.

Subsequently, the matter was remanded for further investigation into the allegations against the individual respondents through an Order of the Investigating Commissioner of August 1, 1994.

MCAD'S INVESTIGATION OF THE COMPLAINT

Investigation of this complaint includes documentary and testimonial evidence provided by the parties. Included among the evidence presented were the complaint and Respondents' position statements.

The Investigation Reveals:

1. Respondent Wells Swanda was, at all relevant times, a natural person, and an employee of Smith College. For a time, Swanda was also a steward for Respondent Local 108. Swanda is a "person" as defined in M.G.L.c. 151B §1(1).
2. Respondent Richard J. Vollinger was, at all relevant times, a natural person, and an employee of Smith College. Vollinger is a "person" as defined in M.G.L.c. 151B §1(1).
3. Respondent William A. Michalowski was, at all relevant times, a natural person, and an employee of Smith College. Michalowski is a "person" as defined in M.G.L.c. 151B §1(1).
4. Respondent Kenneth P. Faust was, at all relevant times, a natural person, and a supervisory employee of Smith College; for a time, Respondent Faust was the direct supervisor of Complainant. Faust is a "person" as defined in M.G.L.c. 151B §1(1).
5. Complainant contends that she was employed by Smith College and a member of the Brotherhood of Carpenters and Joiners, Local 108. Complainant further contends that she was subjected to threats, intimidation and harassment by co-workers and supervisors by the individuals named as respondents, and that such acts occurred as a result of her gender and sexual orientation. Complainant contends that these acts included: an assault upon her person by Respondent Vollinger on March 14, 1991; attempts by the above-named individual Respondents to discredit her skills and character; being disallowed from taking coffee breaks by Respondent Faust, Complainant's direct supervisor; the maintenance of an environment hostile to her status as a woman or as a woman of her sexual preference, as evinced by the posting of certain newspaper and magazine articles; and, that Respondent Swanda refused to represent Complainant in his capacity as Union steward.

6. Respondent Swanda denies Complainant's allegations and contends that Complainant deliberately misconstrued events and comments to benefit her position. Respondent Swanda further contends that, in his capacity as steward, he was disallowed from choosing sides in disputes between members of the union; and, furthermore, that Complainant never approached him in his capacity as steward with any allegations of disparate treatment.
7. Respondent Vollinger denies Complainant's allegations and contends that the alleged assault was an accidental brushing against Complainant. Respondent Vollinger contends that Complainant has engaged in deliberate attempts to discredit him. Respondent Vollinger further contends that he never engaged in any activity which would interfere with Complainant's right to enjoy equal conditions in the workplace.
8. Respondent Michalowski denies Complainant's allegations and contends that he was, until June, 1991, good friends with the Complainant. Respondent Michalowski contends that he tried to help Complainant on certain occasions.
9. Respondent Faust denies Complainant's allegations and contends that he was the foreman of the Carpentry Shop at Smith College. Respondent Faust contends that Complainant did not report the alleged assault to him for remedial action. Respondent Faust further denies that he disallowed Complainant from taking coffee breaks, and contends that her usual ten minute coffee break would be available to her when she was working in the Lock Shop, but that otherwise it would not be available to her because the travel time necessary to get to the Lock Shop would exceed ten minutes. Respondent Faust further contends that the bulletin board in the Carpentry Shop is maintained for the posting of notices and information of interest, including but not limited to postcards from employees on vacation; Respondent Faust contends that Complainant did make a comment about one such postcard. Finally, Respondent Faust contends that Complainant made no complaints to him concerning any allegations of a hostile work environment.

Disposition

Pursuant to Section 5 of Chapter 151B of the Massachusetts General Laws, I have this day found that probable cause exists to credit the allegations of violations of G.L. c. 151B §4(4A) and (5)

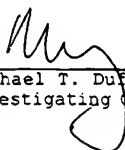
against all of the above named Respondents. Furthermore, I have this day found that probable cause exists to credit the allegations of violations of G.L. c. 151B §4(1) as to Respondent Faust. The Respondents will each be afforded an opportunity to participate in a conciliation conference at the offices of the Commission. If any Respondent does not choose to participate, or if the conference does not result in an informal resolution of the matter, the case against that Respondent will be certified for public hearing and final disposition on this matter will be rendered by the designated Hearing Officer.

Pursuant to Section 5 of Chapter 151B of the Massachusetts General Laws, and in conformity with the foregoing facts, I have this day found that no probable cause exists to credit the allegations of violations of G.L. c. 151B §4(1) against Respondents Swanda, Vollinger and Michalowski.

The parties are directed to appear before the Commission for the purpose of a conciliation conference. The conciliation conference is scheduled as follows:

Date: September 25, 1996
Time: 10:00 a.m.
Location: 436 Dwight Street, Suite 220
Springfield, MA 01103

So ordered this 28th day of June, 1996



Michael T. Duffy,
Investigating Commissioner

Appendix Four:

Cantor probable cause finding



The Commonwealth of Massachusetts
Commission Against Discrimination
 1 Ashburton Place, Boston 02108

Date: **JUL 22 1992**

ADMINISTRATIVE SERVICES: 727-3990

David J. Kerman
 Ropes & Gray
 One International Place
 Boston, MA 02110-2624

RE: Cantor v. The Malden Hospital
 NO: 91-BEM-1458

PROBABLE CAUSE FINDING

Dear Mr. Kerman:

You are hereby notified that I have found probable cause to credit the allegations in the above named complaint. A copy of the disposition is enclosed.

Under Massachusetts General Laws, Chapter 151B, Section 5, the Commission's policy is to attempt to bring about compliance with the state's anti-discrimination laws without resort to a public hearing.

To this end, you are required to attend a meeting at the offices of the Commission on September 7, 1992 at 2:00 PM to explore the possibility of a voluntary settlement. Both sides are expected to bring with them a written agreement proposal of settlement possibilities; and should have the authority to settle the case.

If you have any questions or are unable to attend, call Luisa Carvalho at (617) 727-3990, extension 259. Failure to attend this meeting by either party will result in this case being immediately certified to public hearing.

We wish to resolve this matter as promptly and amicably as possible, and thank you in advance for your cooperation.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Naomi Martell".

Naomi Martell
 Investigating Commissioner

cc: Nancy S. Shilepsky



The Commonwealth of Massachusetts
Commission Against Discrimination
 1 Ashburton Place, Boston 02108

Date:

Feb 22 1992

ADMINISTRATIVE SERVICES: 727-3990

Nancy S. Shilepsky
 Shilepsky, Messing & Rudavsky, P.C.
 44 School Street
 Boston, MA 02108

RE: Cantor v. The Malden Hospital
 NO: 91-BEM-1458

PROBABLE CAUSE FINDING

Dear Ms. Shilepsky:

You are hereby notified that I have found probable cause to credit the allegations in the above named complaint. A copy of the disposition is enclosed.

Under Massachusetts General Laws, Chapter 151B, Section 5, the Commission's policy is to attempt to bring about compliance with the state's anti-discrimination laws without resort to a public hearing.

To this end, you are required to attend a meeting at the offices of the Commission on September 3, 1992 at 2:00 pm to explore the possibility of a voluntary settlement. Both sides are expected to bring with them a written agreement proposal of settlement possibilities; and should have the authority to settle the case.

If you have any questions or are unable to attend, call Luisa Carvalho at (617) 727-3990, extension 259. Failure to attend this meeting by either party will result in this case being immediately certified to public hearing.

We wish to resolve this matter as promptly and amicably as possible, and thank you in advance for your cooperation.

Very truly yours,


 Naomi Martell
 Investigating Commissioner

cc: David J. Kerman

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

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*****  
Frederic Cantor,  
  
COMPLAINANT  
  
v.  
  
The Malden Hospital,  
  
RESPONDENT  
  
*****
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* PROBABLE CAUSE FINDING
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* DOCKET NO: 91-BEM-1458
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I Case Summary:

Complainant's Allegations:

On September 17, 1991, the Complainant, Frederic Cantor, a gay male, filed a complaint with this Commission alleging that on or about June 21, 1991 he was discriminated against in employment in that he was denied employment with Associates in Anesthesia and Respondent, Malden Hospital, because of his sexual orientation, in violation of MGL Chapter 151B Section 4 (1). Complainant also alleges that the screening he was subjected to by Respondent was far greater than that to which heterosexual doctors were subjected.

Respondent's Defense:

Respondent denies discriminating against the Complainant stating that the Commission lacks jurisdiction in the charges because the Complainant never sought to enter into any employment relationship with Malden Hospital. Respondent also states that it did not take any action to prevent Complainant from acquiring employment with Associates in Anesthesia nor did it aid or encourage any other person to discriminate or take adverse action against the Complainant. Respondent further states that the Complainant was denied temporary hospital benefits because of the negative references received from Quincy Hospital where he previously performed as anesthesiologist.

II Undisputed Issues:

1. On or about June 11, 1991, a recruiter from Malden Hospital called the Complainant.
2. On or about June 12, 1991, The Complainant interviewed with Anil Kumar, M.D., Chief of Anesthesia at Malden Hospital and President of Associates in Anesthesia, Inc. Dr. Kumar was interviewing candidates for a position with Associates in Anesthesia to provide anesthesia at Malden Hospital.
3. During the June 12 interview, the Complainant provided Dr. Kumar four references. The four references were from the former Chief of Anesthesia at Quincy Hospital who supervised Complainant for almost a year (through January 1991); an obstetrician at Quincy Hospital who worked with Complainant through June 1991; the Director of Complainant's anesthesiology residency program (which Complainant completed in June 1990); and an anesthesiologist with whom the Complainant worked during his residency. All these references were favorable.
4. On June 14, 1991, Dr. Kumar advised the Complainant that any employment with Associates in Anesthesia was conditioned upon Complainant obtaining privileges at Malden Hospital. Subsequently, Complainant was offered six months employment with Associates in Anesthesia to commence July 1, 1991 subject to Complainant obtaining the requisite hospital privileges. Complainant accepted said offer and a written contract was thereafter signed on June 14, 1991.
5. The Malden Hospital application for privileges requires only three physician references, at least two of which have "professional qualifications and clinical specialties similar to your own" and preferably including the "Chief of service from your residency program," i.e., one's Director. Complainant's references met all these requirements.
6. On June 17, 1991, Dr. Aldredge was at Malden Hospital for an interview for a second available position with Associates in Anesthesia. Dr. Kumar asked Dr. Aldredge if the Complainant was homosexual. Dr. Aldredge affirmed that Complainant is gay, explaining that it was not a problem with his performance or otherwise.

7. On June 18, 1991, Dr. Kumar called the Complainant and asked him if he could begin work one week early, June 24, 1991.

8. Dr. Kumar told Mr. Robert Rulison, Executive Vice President of Malden Hospital, that Associates in Anesthesia had signed an employment agreement with the Complainant to provide anesthesia at Malden Hospital.

9. Dr. Kumar acquiesced to Malden Hospital's request that Respondent make further inquiries about Complainant. Dr. Kumar spoke to Dr. Terence Smith, the acting Chief of Anesthesia at Quincy Hospital, to Dr. Neil Berman, a cardiologist and Chief of the Medical Staff at Quincy Hospital, to Dr. Peter Ambrus, and to Dr. Thomas Divinagracia. Only Dr. Ambrus and Dr. Divinagracia, neither of whom are anesthesiologists, gave Complainant negative reviews.

10. On or about June 14, 1991, Complainant was informed by Dr. Kumar that after doing further screening about him, he could not obtain privileges at Malden Hospital and the employment offer of June 14, 1991 was withdrawn.

III Disputed Issues:

1. Malden alleges that there was no employment relationship between Complainant and Malden and that neither Malden nor its agents discriminated against the Complainant. Malden asserts that Complainant was to be an independent contractor and not an employee.

Investigation revealed that Malden had a substantial control over the manner in which Complainant's work was to be performed. Malden provided all of the equipment necessary for performance of anesthesia services; Malden scheduled all of the surgical procedures; and anesthesia services are an integral part of Malden's business as a health care facility. The fact that Complainant's contract would have been with Associates in Anesthesia does not preclude the possibility that Malden would have been Complainant's employer. Malden could be considered as a joint employer even though Associates in Anesthesia is an independent contractor with Malden.

2. Malden also asserts that it did not discriminate against the Complainant because he was to be employed by Associates in Anesthesia.

Complainant alleges that Dr. Kumar was an agent for Malden. Kumar performed managerial and administrative tasks for Malden and was its agent for purposes of running the daily operations of Malden's Anesthesia Department. Complainant also states that the acts and conduct of Dr. Kumar and Associates in Anesthesia are attributable to Malden because Dr. Kumar was a Malden Agent.

A review of the contract of Associates in Anesthesia and Malden Hospital indicates that Dr. Kumar could be considered as Malden's agent. Dr. Kumar was the Chief of the Division at Malden Hospital. He provided administrative and professional anesthesia services at the Hospital.

3. Complainant alleges that he was discriminated against by Malden Hospital because of his sexual orientation in that he was subjected to greater scrutiny than other candidates and Malden relied on unreliable information to prevent him from practicing at Malden. Complainant alleges that on June 19, 1991, after Malden (Mr. Rulison) learned from Dr. Kumar that Complainant is gay, the Complainant was subjected to an unusual high level of scrutiny.

Malden states that Mr. Rulison was aware that Complainant had not been offered a position with the new anesthesiologist group at Quincy Hospital, he felt that it was important to obtain information about Complainant's work performance at Quincy. Dr. Kumar noted that Complainant had not offered many references from Quincy Hospital. Mr. Rulison would meet with a Quincy Hospital Vice President on an informal basis and he would inquire about Complainant's job performance at Quincy. Rulison spoke with Neal Strohman of Quincy Hospital who stated that there had been concerns expressed at Quincy Hospital about Complainant clinical skills. Rulison related this information to Dr. Kumar who called Dr. Divinagracia and Dr. Amburs from Quincy Hospital.

Malden was aware, prior to June 19, 1991, that Dr. Kumar was actively recruiting the Complainant. At that time, Malden did not recommend that Complainant's performance at Quincy Hospital be scrutinized further. On June 12, 1991 the Complainant provided four references. The four references were Dr. Kay Aldredge, the former Chief of Anesthesia at Quincy Hospital who supervised the Complainant for one year, through January 1991; Dr. Abe Fannous, an obstetrician at

Quincy Hospital who worked with Complainant through June 1991; Dr. Ennio Gallozzy, the Director of Complainant's anesthesiology residency program; and Dr. Gary Mellen, an anesthesiologist with whom the Complainant worked during his residency. All of these references were favorable. The Malden Hospital application for privileges requires only three physicians references, at least two of which have "professional qualifications and clinical specialties similar to your own" and preferably including the "Chief of Service from your residency program," i.e., one's Director. Complainant's references met all these requirements.

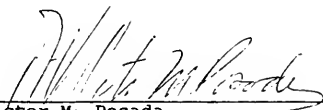
On June 17, 1991, Dr. Aldredge was at Malden Hospital for an interview for a second available position with Associates in Anesthesia. Dr. Kumar asked Dr. Aldredge if the Complainant was homosexual. Dr. Aldredge affirmed that Complainant is gay, explaining that it was not a problem with his performance.

On or about June 19, 1991 Malden required more information about the Complainant. Mr. Rulinson made his own inquiry about Complainant although under the Malden Hospital By-Laws, it is the Department or Division Chief (i.e., Dr. Kumar) who has the responsibility to submit an authoritative opinion regarding the competence and ethical standing of a physician applying for temporary privileges.

IV Conclusion:

Investigation has revealed sufficient evidence to credit Complainant's allegation that he was subjected to greater scrutiny than that established as standard procedure for obtaining hospital privileges with Malden Hospital. The Complainant provided four references which were favorable; therefore Respondent had no reason to ask for further references. Such references were requested after Dr. Aldredge was asked whether Complainant is gay. Investigation also revealed that regarding further inquiry, only two physicians gave references which could be characterized as bad. Six physicians, including all four anesthesiologists contacted, gave favorable references about the Complainant. However based on these two references of two non-anesthesiologists Respondent decided not to hire the Complainant through Associates in Anesthesia.

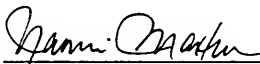
Investigation has revealed sufficient evidence to credit Complainant's allegations of discrimination, therefore a probable cause finding is recommended in this case.


 Victor M. Posada
 Compliance Officer

DISPOSITION:

Therefore, pursuant to Section 5 of Chapter 151B of the Massachusetts General Laws, and in conformity with the foregoing Findings, I have this day found that probable cause exists for crediting the allegations of the subject complaint. Pursuant to said Section 5, Respondent will be afforded an opportunity to participate in a conciliation conference at the offices of the Commission. If Respondent does not choose to so participate, or if such conference does not prove to be productive, the case will be certified for public hearing, at which time the Respondent will be given a full opportunity to answer the allegations of the Complaint.

July 22, 1992
 Disposition Date

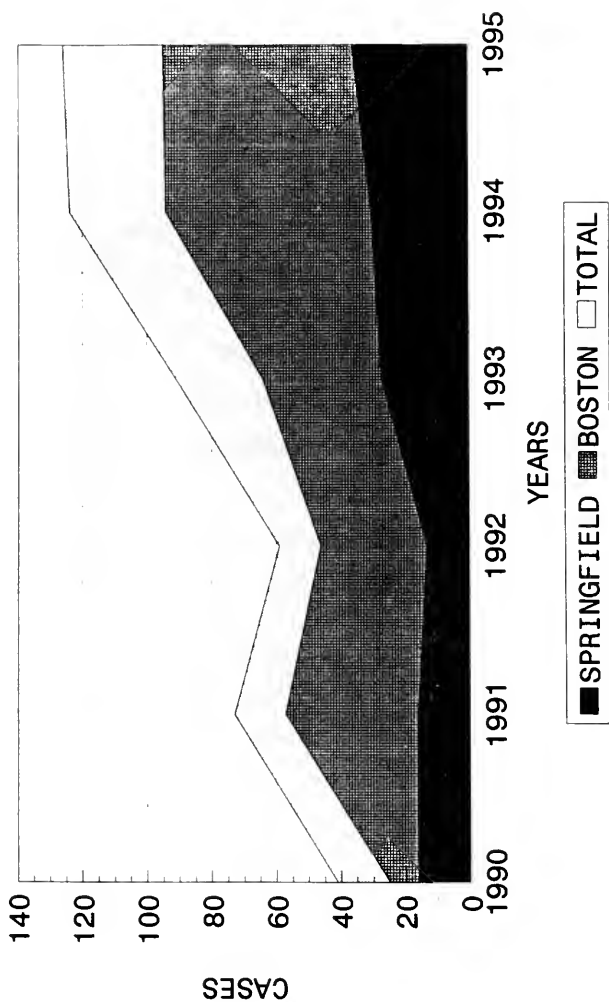

 Naomi Martell
 Investigating Commissioner

Appendix Five:

MCAD's sexual orientation case load

MCAD EMPLOYMENT CASES

SEXUAL ORIENTATION



STATEMENT OF
CHAI R. FELDBLUM
ASSOCIATE PROFESSOR OF LAW
GEORGETOWN UNIVERSITY LAW CENTER

BEFORE THE
COMMITTEE ON SMALL BUSINESS
SUBCOMMITTEE ON GOVERNMENT PROGRAMS
UNITED STATES HOUSE OF REPRESENTATIVES

IN SUPPORT OF
H.R. 1863, THE EMPLOYMENT NON-DISCRIMINATION ACT OF 1995

JULY 17, 1996

Mr. Chairman and Members of the Committee, my name is Chai Feldblum. I am an Associate Professor of Law and Director of the Federal Legislation Clinic at Georgetown University Law Center. I am pleased to testify before you today.¹⁷

My experience in the area of sexual orientation and the law is both academic and practical. On the academic side, I have taught Sexual Orientation and the Law at Georgetown University Law Center for several years and have recently published a scholarly article in the area.²¹ On the practical side, I serve as a legislative lawyer to the Human Rights Campaign (HRC), the largest national gay and lesbian political organization. In that position, I have written and submitted legal briefs on behalf of HRC and other civil rights groups in the Supreme Court case of *Romer v. Evans*, and in several cases challenging the gay military ban. Of particular import for today, over a period of three years I have served as a legal expert to Congress in the formulation of the Employment Non-Discrimination Act of 1995 (ENDA) and have helped guide and formulate the legal work on behalf of the bill.

My written testimony covers the following areas:

- The lack of existing legal protection for gay men, lesbians, bisexuals, and heterosexuals who experience discrimination in employment based on their sexual orientation;

¹⁷ I would like to thank Beverly Armstrong, Enoch T. DeGraff, Janell Fonsworth, Linda Kovan, Dawn Piper, Jeffrey Salinger, Tony Varona, Steven D. Weatherhead, and Wendy Zazik, with the law firm of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., for their valued assistance in researching and preparing this Testimony and its Appendices.

²¹ Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 *U. Pitt. L. Rev.* 237 (1996) [hereinafter Feldblum, *Devlin Revisited*].

- The type of employment discrimination that occurs based on sexual orientation and, therefore, the need for a law such as ENDA;
- An analysis of what ENDA actually prohibits, and does not prohibit, in the area of sexual orientation employment discrimination; and finally
- A response to common arguments raised against the bill by opponents.

I. LACK OF EXISTING LEGAL PROTECTION AGAINST SEXUAL ORIENTATION DISCRIMINATION.

A majority of the American public believes gay men and lesbians *currently* enjoy protection against arbitrary discrimination in the workplace.^{3/} This misperception should not surprise us. American people have an intuitive sense that essential American values of fairness and equality prevail in our society and that, indeed the federal Constitution or "some federal law" should protect Americans from unfair and arbitrary discrimination in the workplace.^{4/}

Unfortunately, this is not the case. As civil rights attorneys across this country know, the federal Constitution prohibits discrimination *only* when practiced by a governmental body or by an entity significantly intertwined with a governmental body.^{5/} Thus, even if gay

^{3/} Approximately 70% of the American voters are unaware that federal civil rights laws do not prohibit firing a person solely on the basis of his or her sexual orientation. See Lake Research, Inc. (a Democratic polling firm) and the Tarrance Group (a Republican polling firm), Joint Bipartisan Poll, February 1995. (The survey reached 800 Americans who indicated that they were registered to vote.)

^{4/} David A. Kaplan & Daniel Klaidman, *A Battle, Not the War*, NEWSWEEK, June 3, 1996, at 24-25.

^{5/} To bring a constitutional challenge against an employment decision made by a non-
(continued...)

people were successful in gaining protection from discrimination under the provisions of the federal Constitution -- an outcome made significantly more likely by the recent Supreme Court decision in *Romer v. Evans* -- such protection would *still* not provide legal recourse to the majority of gay people who work for *private* employers. Gay people need what other minorities and women *currently* have in this country: protection by the federal Constitution, for which they look to the courts for enforcement, *and* protection by a federal *statute*, for which they look to Congress for enactment.

Individuals who experience discrimination in private employment because of their *race, religion, national origin, gender, age, or disability* are currently covered under various federal anti-discrimination laws. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. The Age Discrimination in Employment Act of 1967 prohibits employment discrimination on the basis of age. And the Americans with Disabilities Act of 1990 prohibits employment discrimination on the basis of disability.⁶¹

⁵¹(...continued)

governmental employer, an individual must show: 1) that the state compelled the employer to act as it did; or, 2) that the employer provided a public function that the state was obligated to provide; or, 3) that the relationship between the state and the employer is so close that it is fair to treat the two as one entity. See, *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

⁶¹ Other federal laws also prohibit various forms of discrimination by entities that receive federal funds. Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, and religion by such entities; Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability by such entities; the Age Discrimination Act of 1975 prohibits discrimination on the basis of age by such entities; and Title IX of the Education Amendments of 1972 prohibit discrimination based on sex in educational institutions that receive federal funds.

In a few cases, gay people have attempted to receive protection under Title VII by arguing that discrimination on the basis of sexual orientation should be included under the rubric of sex discrimination. The judicial responses to such challenges have been universally negative. For example, the Sixth Circuit Court of Appeals, ruling against Ernest Dillon who brought a sexual orientation discrimination claim under Title VII, commented: "[Dillon's coworkers' actions] were all directed at demeaning him solely because they disapproved of his alleged homosexuality. These actions, although cruel, are not made illegal by Title VII."⁷⁷ Courts have been uniform in their rulings that discrimination based on sexual orientation is not outlawed by Title VII.⁸⁰

Thus, with few exceptions, gay men, lesbians, and bisexuals who experience discrimination in employment have no constitutional protection and no federal statutory protection. Some gay people who have experienced egregious forms of discrimination have pursued tort remedies, and some have pursued implied-contract remedies. As a general matter, however, such claims have not been successful.⁹¹

⁷⁷ *Dillon v. Frank*, No. 90-2290, 1992 U.S. App. LEXIS 766 (6th Cir. Jan. 15, 1992). Additional cases in which a Title VII claim has been raised unsuccessfully to challenge sexual orientation employment discrimination are summarized in Appendix I.

⁸⁰ See, e.g., *Williamson v. A.G. Edwards and Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals."); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) ("[W]e conclude that Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality."); See also Appendix I.

⁹¹ See Appendix I, summarizing a number of cases brought under contract or tort theories, several of which were successful.

Some protection does exist for gay people in a few states that have enacted anti-discrimination legislation. Nine states and the District of Columbia have laws that prohibit employment discrimination on the basis of sexual orientation. These states are Wisconsin, which enacted the first law in 1982, followed by Massachusetts in 1989, Connecticut and Hawaii in 1991, California, New Jersey, and Vermont in 1992, Minnesota in 1993, and Rhode Island in 1995.^{10/} In addition, numerous localities have laws or ordinances prohibiting discrimination based on sexual orientation.^{11/}

With the recent Supreme Court ruling in *Romer v. Evans*, the political process in states and localities can now continue to operate unimpeded, and additional localities and states may choose to pass such anti-discrimination legislation based on sexual orientation.^{12/} But the reality for *most* gay people in America today is that *no* effective legal recourse exists to counter employment discrimination based on sexual orientation.

^{10/} See Wis. Stat. Ann. §§ 101.22, 111.32 (West 1988); Mass. Gen. Laws Ann. §§ 151B, §§ 3-4 (West 1982); Conn. Gen. Stat. Ann. §§ 46a-81a to -81r (West Supp. 1994); Haw. Rev. Stat. §§ 378-1 to -3 (Supp. 1995); Cal. Lab. Code § 1102.1 (West Supp. 1995); N.J. Stat. Ann. §§ 10:5-5, 10:5-12 (West 1993); Vt. Stat. Ann. tit. 1 § 143 (Supp. 1994); tit. 9 §§ 4503-4504 (Supp. 1994), tit. 21 § 495 (Supp. 1994); Minn. Stat. Ann. § 363 (West Supp. 1995); R.I. Gen. Laws §§ 11-24-2.1, 11-24-2.2, 28-5-3, 28-5-7, 28-5.1-7, 28-5.1-9, 34-37-2, 34-37-4, 34-37-4.3, 34-37-4.4, 34-37-5.2, 34-37-5.4 (West 1995). All nine states prohibit sexual orientation discrimination in employment, and all but California extend this protection to housing and public accommodations. Minnesota and Wisconsin also outlaw sexual orientation discrimination in public and private education.

^{11/} *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990) (citing various state legislative provisions prohibiting discrimination on the basis of sexual orientation); See also *Developments in the Law—Employment Discrimination*, 109 Harv. L. Rev. 1568, 1625-26 (1996) (discussing statutory prohibitions on sexual orientation discrimination at the municipal level).

^{12/} See generally, *Romer*, ____ U.S. ____, 116 S. Ct. 1620.

II. THE EXISTENCE OF EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND THE NEED FOR FEDERAL LEGISLATION

There is a long tradition in this country, embodied in the "employment-at-will" doctrine, which allows private employers to fire, hire, and make other employment decisions as they wish. While the labor movement in this country has made strides in negotiating contractual protections for its members, most private employers' prerogatives are constricted only in limited circumstances: if they voluntarily choose to bind themselves by contract; or, in some states, if their actions are found to be contrary to public policy;^{13/} or if *the state or federal government has enacted anti-discrimination legislation*.

Historically, state or federal governments have passed anti-discrimination legislation in situations in which there is a *demonstrated problem of discrimination against a recognized group of people*. Compelling evidence of such discrimination, on bases such as race and gender, was evident in 1964 when Congress passed Title VII of the Civil Rights Act of

^{13/} In some states, the courts have created an exception to the "employment-at-will" doctrine by refusing to uphold discharges that are contrary to the state's public policy. For example, an employee who is discharged in retaliation for "whistle-blowing," in a state that has a policy encouraging whistle-blowing, may successfully argue the discharge was illegal because it contravened the state's public policy. See *e.g.*, *Sherman v. Kraft Gen. Foods*, 651 N.E. 2d 708 (Ill. App. Ct. 1995); *Baiton v. Carnival Cruise Lines, Inc.*, 661 So. 2d 313 (Fla. Dist. Ct. App. 1995).

The public policy exception, however, requires a pre-existing expression of the state's policy, usually embodied in a state statute or regulation. This exception has never been successfully invoked in the area of sexual orientation, probably because if there were a state law prohibiting sexual orientation employment discrimination (which would embody the state's policy), an individual could sue directly under that law. See *e.g.*, *Hicks v. Arthur*, 843 F. Supp. 949 (E.D. Penn. 1994) (plaintiff failed to demonstrate a clearly mandated public policy rationale supporting a sexual orientation exception to the employment at will doctrine).

1964.^{14/} Compelling evidence of such discrimination, on the basis of age, was evident in 1967 when Congress passed the Age Discrimination in Employment Act.^{15/} And compelling evidence of such discrimination, on the basis of disability, was evident in 1990 when Congress passed the Americans with Disabilities Act.^{16/}

Compelling evidence of such discrimination, on the basis of sexual orientation, is evident today. Three appendices to my testimony document such cases of discrimination. Appendix I summarizes cases alleging employment discrimination that have reached federal and state courts over the years and have resulted in judicial opinions. This compilation of cases reflects the various types of discrimination gay people have faced over the years.

Appendix II catalogs the number and type of complaints that were filed in six out of eight of the states with sexual orientation anti-discrimination laws as of 1994-- a total of 514 complaints over the course of five years. The vast majority of these complaints dealt with employment. This tabulation indicates there *are* cases of alleged discrimination based on sexual orientation that will be brought if some legal recourse is available. At the same time, this tabulation confirms that fears about a flood of litigation released by such laws are unfounded. Indeed, there are no known examples of businesses, either large or small, experiencing difficulties with these nine state laws.

^{14/} S.Rep No. 872, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2368-77.

^{15/} H.R.Rep No. 805, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2214 and 2225-27.

^{16/} H.R.Rep. No. 101-485(II), 101st Cong., 2d Sess. 28-50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 310-32; H.R.Rep. No. 101-485(III), 101st Cong., 2d Sess. 25-26 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 447-49.

Appendix III summarizes thirty-two personal cases of discrimination documented by the Human Rights Campaign and published in a monograph entitled *Documented Cases of Job Discrimination Based on Sexual Orientation*. And the Committee has heard today from five people who personally experienced discrimination on the basis of sexual orientation: Todd Dobson, Ernest Dillon, Michael Proto, Karen Solon, and Nan Miguel.

The type of discrimination faced by gay men, lesbians, and bisexuals has evolved over the course of our nation's history.^{17/} Economic and social changes in the first part of this century resulted in the development of gay communities in some urban centers and some increased public visibility of gay people.^{18/} Even this limited public visibility of gay people however, resulted in a crackdown on the ability of gay people to congregate. Police raids on gay bars and the arrest of patrons were common; patrons afraid of publicity rarely challenged any charges.^{19/}

Discrimination against gay men and lesbians by the government intensified in the 1950s, setting a norm for private actors.^{20/} In 1950, the Senate directed a Senate Investigations Subcommittee "to make an investigation into the employment by the Government of homosexuals."^{21/} The Subcommittee ultimately recommended that all

^{17/} This summary of discrimination is adapted from Feldblum, *Devlin Revisited*, *supra* n.2 at 272-74.

^{18/} John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America*, 226-27, 288-91 (1988) [hereinafter D'Emilio & Freedman, *Intimate Matters*].

^{19/} Patricia Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 Va. L. Rev. 1551, 1565 (1993) [hereinafter Cain, *Litigating*].

^{20/} D'Emilio & Freedman, *Intimate Matters*, *supra* n.18, at 292-95.

^{21/} Cain, *Litigating*, *supra* n.19, at 1565-66 (quoting S. Doc. 241, 81st Cong.,

(continued...)

homosexuals be dismissed from government employment.^{22/} In 1953, President Eisenhower issued Executive Order 10,450 calling for the dismissal of all government employees who were homosexuals.^{23/} It is estimated that from 1947 through mid-1950, 1700 individuals were denied employment by the federal government because of their alleged homosexuality.^{24/}

The 1950s witnessed the development of organizations that were precursors to the modern gay civil rights movement.^{25/} The late 1960s witnessed the birth of the gay rights movement, with its growth aided by the women's movement.^{26/} And in the mid-1970s, the psychiatric profession officially confirmed that homosexuals were no different than heterosexuals in terms of emotional stability.^{27/}

Discrimination against gay people continued through the years and up to the present, albeit in different forms. In the mid-1950s, almost all gay people assumed that survival required they hide their sexual orientation completely--from friends, family, and co-workers.

^{21/} (...continued)
2d Sess. 1 (1950)).

^{22/} *Id.* at 1566.

^{23/} *Id.*

^{24/} *Developments in the Law -- Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1556 (1989) (footnote omitted) [hereinafter *Developments*].

^{25/} *Id.* at 1515-16.

^{26/} See Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187, 206-12 (1988) [hereinafter *Law, Homosexuality*].

^{27/} R. Bayer, *Homosexuality and American Psychiatry: The Politics of Diagnosis* 18-40 (1981).

Thus, discrimination primarily took the form of affirmatively ferreting out, harassing and/or purging gay people from public areas such as bars and government employment. Over the last forty years, as more gay people have refused to hide their orientation, honesty has brought targeted discrimination in its wake.^{28/}

Most gay men, lesbians and bisexuals today choose to hide their sexual identity because of fear of discrimination or because of actual experience of discrimination. A 1992 survey of 1,400 gay men and lesbians in Philadelphia showed that 76% of men and 81% of women conceal their sexual orientation at work.^{29/} A review of twenty surveys conducted across this country between 1980 and 1991 showed that between 16 and 44 percent of gay men and lesbians had experienced discrimination in employment.^{30/} A 1987 Wall Street Journal poll of Fortune 500 executives indicated that 66% of these executives would hesitate to give a management job to a gay person.^{31/} Job discrimination can be even more blatant in non-management positions. Cheryl Summerville, an employee at a Cracker Barrel restaurant, was fired after three years on the job. Her separation notice from Cracker Barrel

^{28/} See generally, Samuel A. Marcossan, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 Geo. L.J. 1 (1992); *Lesbians, Gay Men and the Law* 243-334 (William B. Rubenstein ed., 1993).

^{29/} *Employment Discrimination on the Basis of Sexual Orientation: Hearings on S. 2238 Before the Senate Committee on Labor and Human Resources*, 103d Cong., 2d Sess. 70 (1994) (statement of Anthony P. Carnevale, Chair, National Commission for Employment Policy) [hereinafter *Hearings*].

^{30/} *Id.*

^{31/} *Id.*

restaurant read: "This employee is being terminated due to violation of company policy.

This employee is gay."^{32/}

Whether gay people attempt to hide their sexual identity or are honest about their identity, they remain vulnerable to discrimination, and in the most extreme form of that discrimination, physical violence. The National Institute of Justice (NIJ) sponsored a report in 1987 which found "the most frequent victims of hate violence today are Blacks, Hispanics, Southeast Asians, Jews, and gays and lesbians. Homosexuals are probably the most frequent victims."^{33/} The Los Angeles County Commission on Human Relations reported that for 1993 gay men had replaced African-Americans as the leading target of hate crimes; gay men were targeted in 27% of the 783 hate crimes documented by law enforcement agencies and community groups.^{34/}

As noted, because of this fear of discrimination or violence, gay men and lesbians often choose to hide their distinguishing characteristic by disguising or lying about their personal interests, relationships, and activities. But this socially imposed pressure to "pass" is itself a form of discrimination. Indeed, constantly keeping secret an important part of one's identity can create shame, undermine self-respect, and increase stress levels.^{35/}

In America today, gay men, lesbians, and bisexuals thus face two forms of discrimination. For those gay people who are afraid of the consequences of disclosing their

^{32/} See *Hearings supra* n.29, at 6.

^{33/} *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* at 7 (Gregory M. Herek & Kevin T. Berrill eds., 1992).

^{34/} *Crimes of Bias*, L.A. Times, Mar. 30, 1995, at A1.

^{35/} See *Hearings supra* n.29, at 212; Feldblum, *Devlin Revisited supra* n.2, at 326-27.

sexual identity, including employment discrimination, the discrimination operates in the form of a self-imposed silence and deception, with a concomitant constant fear of disclosure. Gay people who opt for honesty and who disclose their sexual identity are left in a predicament similar to women and African-Americans whose gender and race, respectively, are disclosed automatically. Discriminatory actions against gay people parallel the type of adverse employment actions historically suffered by women, African-Americans and other minorities -- for example, firing, refusal to hire, refusal to promote, and hostile working environments.

III. H.R. 1863: THE EMPLOYMENT NON-DISCRIMINATION ACT OF 1995

H.R. 1863, the Employment Non-Discrimination Act of 1995, represents a reasoned and balanced approach to remedying employment discrimination on the basis of sexual orientation.

The core of ENDA is found in Section 2. That section states:

A covered entity, in connection with employment or employment opportunities, shall not --

- (1) subject an individual to different standards or treatment on the basis of sexual orientation;
- (2) discriminate against an individual based on the sexual orientation of persons with whom such individual is believed to associate or to have associated; or
- (3) otherwise discriminate against an individual on the basis of sexual orientation.

The core prohibition in ENDA is simple and straightforward. An employer may not use the fact of an individual's sexual orientation in making employment decisions. An employer may not treat an individual better or worse because that individual is a gay man, a lesbian, a bisexual, or a heterosexual. No better and no worse -- *just the same*.

ENDA does not deal with the issue of domestic partner benefits. Over 150 companies currently choose to provide health and other benefits to the same-sex partners of their employees. Businesses are discovering that "domestic partner" policies make sense: they are not costly, they are fair, they make the companies competitive, and CEOs who take the lead in adopting such policies usually reap praise and appreciation from a wide spectrum of individuals.^{36/} More companies across the country are likely to follow the lead of companies such as Microsoft Corporation, Levi Strauss & Company, Walt Disney Company, Hewlett-Packard Company, and Eastman Kodak Company which voluntarily provide partner benefits. ENDA, however, does not mandate such benefits.

ENDA also does not provide for a "disparate impact" claim. A disparate impact claim is a claim that a facially neutral practice of an employer has a disproportionately adverse effect on persons of a particular protected group.

A disparate impact claim under Title VII relies heavily on statistics. Traditionally, a plaintiff compares the percentage of individuals of a particular gender, race, or ethnicity in

^{36/} See, e.g., Jay Mathews, *Corporations Quietly Granting Health Benefits to Gay Lifestyles*, Wash. Post, October 17, 1993 (listing companies providing domestic partner benefits and cost of such benefits); Hollace Weiner, *More Firms Offer Benefits to Gay Workers' Partners*, Fort Worth Star-Telegram, December 27, 1994 (more than 140 employers extend medical benefits to homosexual domestic partners at a cost of "next to nothing").

an employer's workforce with the percentage of such individuals in the pool of qualified applicants. If there is a significant disparity between the percentages, the plaintiff may argue that one or more of the employer's neutral employment practices causes the adverse effect on the hiring of such individuals. If the plaintiff makes out this case, the employer must then show the challenged employment practice is job-related and consistent with business necessity. Congress codified the "disparate impact" claim under Title VII in the Civil Rights Act of 1991.^{37/}

ENDA excludes disparate impact claims primarily because it is difficult to perform an accurate statistical analysis in the context of sexual orientation. Privacy concerns ordinarily foreclose an accurate statistical count of *all* gay men, lesbians, bisexuals, and heterosexuals in an employer's workforce and in the qualified applicant pool. While one could develop a count of the number of *openly* gay people in a particular workforce, it would be difficult, if not impossible, to assess the number of openly gay people in the relevant applicant pool.

Moreover, gay people do not usually face the type of discrimination that takes the form of disparate impact. Rather, the discrimination that occurs usually is either overt, intentional discrimination or facially neutral actions that are *pretexts* for discrimination. Both of these types of actions are prohibited by ENDA.

ENDA also prohibits an employer from adopting a *quota* based on sexual orientation and from giving *preferential treatment* to any individual based on the individual's sexual orientation. This is *stricter* than the rule which applies under Title VII. Under Title VII, an

^{37/} 42 U.S.C.S. 2000e-2 (Supp. May 1996).

employer may voluntarily engage in preferential treatment in certain circumstances.^{38/}

Under ENDA, while an employer may increase the diversity of its workplace by advertising and reaching out to members of the gay community, the employer may *not* give preferential treatment to an individual based on that individual's sexual orientation.

ENDA contains a broad *religious exemption*. The types of religious organizations that are exempted are derived from a similar exemption in Title VII. The scope of the exemption, however, is significantly *broader* than the scope in Title VII. In Title VII, religious organizations are exempt with regard to *religion*, but they remain subject to the *other* requirements of Title VII with regard to such bases as race or gender (consistent with constitutional limitations).^{39/} By contrast, except for profit-making activities, ENDA exempts religious organizations *completely*, thus exempting them entirely from the prohibition of discrimination based on sexual orientation.

ENDA does not apply to the relationship between the United States and members of the Armed Forces. Thus, the bill does not affect current law on gay men, lesbians, and

^{38/} See, e.g., *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979) (Title VII does not prohibit affirmative action plan giving preference to black employees); 42 U.S.C.S § 2000e-2(j) (1989) (interpreted by *Weber* as permitting but not requiring voluntary affirmative efforts to correct racial imbalances).

^{39/} 42 U.S.C.S. § 2000e-1 (1989 & Supp. May 1996) (Title VII not applicable to a "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities"); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985), *cert. denied* 478 U.S. 1020 (1986) (while "religious institutions may base relevant hiring decisions upon religious preferences, Title VII does not confer upon religious organizations a license to make these same decisions on the basis of race, sex, or national origin").

bisexuals in the military. The ban on the service of gay people in the military is morally wrong and should be eliminated. But the validity of that ban will soon reach the United States Supreme Court and many of us believe the Supreme Court will strike the ban down as unconstitutional.

Finally, ENDA adopts the enforcement mechanisms of Title VII, as amended by the Civil Rights Act of 1991. There is no desire to re-fight battles regarding enforcement in this bill. Rather, whatever enforcement mechanisms are granted to, and required of, other minorities and women under Title VII are the enforcement mechanisms that will be granted to, and required of, individuals who bring claims under this law. Thus, the requirement of filing claims with the Equal Employment Opportunity Commission (EEOC); the ability of an individual to bring a private right of action in court; and the ability of an individual to receive injunctive relief and damages, up to the limits authorized by Title VII, are all incorporated by reference in ENDA.^{40/}

ENDA represents a reasoned and well-balanced approach to remedying discrimination based on sexual orientation in the workplace. It is an approach that is patterned on the great tradition of civil rights in this country. Indeed, civil rights lawyers from the Leadership Conference on Civil Rights (LCCR), religious leaders from LCCR, and lawyers who represent gay men and lesbians across this country worked with Congressional experts to fashion this legislation.

^{40/} See 42 U.S.C.S. § 2000e-5 (1989 & Supp. May 1996).

IV. RESPONSES TO COMMON ARGUMENTS RAISED AGAINST ENDA

Several arguments are raised repeatedly by individuals who oppose passage of a law prohibiting employment discrimination based on sexual orientation. I believe a fair assessment of those arguments reveals their insufficiency.

A. The "Frequent Flyer" Argument

The first claim often raised by opponents is that gay people really do not *need* job protection. The support for this claim is that gay people are among the most economically advantaged in this country -- a supposed "elite group."^{41/} The evidence for this claim is that gay people purportedly have higher than average per-capita annual incomes, are more likely to be college-educated, and are more likely to travel -- hence, my description of this claim as the "frequent flyer" argument. Even Justice Scalia is not above making this claim.^{42/}

There is one significant problem with this claim. Its basis is not a national statistically random sample. The main source used by all opponents is The Simmons Report. The marketing company that produced the report explained that the data describes *readers of selected gay publications in various large cities*. As a company representative explained in a memo in 1994:

^{41/} *Employment Discrimination*, (Statement of Professor Joseph E. Broadus, George Mason University School of Law).

^{42/} See *Romer*, ___ U.S. ___, 116 S. Ct. at 1634 ("those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and . . . possess political power much greater than their numbers...")(citations omitted)(Scalia, J., dissenting).

"The information gathered by the Simmons organization was never intended (and never claimed) to represent the gay and lesbian community at large, but only the readers of the individual member publications. Just as a survey of the readers of Newsweek, Forbes, or Redbook are not representative of all Americans, the Simmons survey does not represent all members of the gay and lesbian community."^{43/}

Dr. Lee Badgett, a professor of economics at the University of Maryland who has studied this issue, points out that it makes good marketing sense to survey a group of readers to determine the value of advertising in the publications they read.^{44/} But common sense tells us those results will not accurately describe a larger group who share one characteristic (such as sexual orientation) with the readership sample.^{45/} For example, Dr. Badgett points out it would be inaccurate to take a description of the readers of magazines aimed at African Americans as an accurate description of *all* African Americans in the United States.^{46/} In

^{43/} Rivendell Marketing Company, Inc., Memorandum Re Simmons Market research Survey Of Readers Of Gay Publications, July 28, 1994. In this memorandum, the company illustrated how the Simmons survey results were clearly not representative of the greater gay and lesbian community:

Who is the typical surveyed reader? He is basically white male, with the median age of 36, employed (92.1 % are employed), with a college degree (59.6 % have graduated a 4 year college or more), who lives in a city (71.8 % live in urban areas), with a household income of \$63,700, and an average individual income of \$41,300. You will see that women and people of color are out of the picture. It's not by any oversight on the part of Simmons, it just doesn't reflect the readership of these publications. If the opposition wants to use this information against the gay community, then they have to realize that they are not including the whole picture, but only a segment of the total market.

^{44/} M. V. Lee Badgett, *Beyond Biased Samples: Challenging the Myths on the Economic Status of Lesbians and Gay Men* at 4 (1994).

^{45/} *Id.*

^{46/} *Id.*

fact, as Dr. Badgett points out, in 1989, the *same* Simmons research group "did a survey revealing that readers of *Ebony*, *Essence*, and *Jet* magazine earn 41 to 82% more than the typical African American."^{47/}

In contrast to the Simmons study, which intentionally used a skewed sample of readers of gay magazines, a study conducted by Yankelovich Partners in 1994 was described by the New York Times as "probably the first nationally representative survey" that included the average earnings of gay and lesbian Americans.^{48/} The Yankelovich survey found that gay men actually had a lower personal income and lower household income than heterosexual men in certain categories.^{49/} The mean personal income for gay men was \$21,500 as compared to \$22,500 for heterosexual men and the mean household income for gay men was \$37,400 as compared to \$39,300 for heterosexual men.^{50/}

^{47/} *Id.*

^{48/} Stuart Elliot, *A Sharper View of Gay Consumers*, *N.Y. Times*, June 9, 1994, at D1; See also *MARKETWRAP* (CNBC television broadcast, June 9, 1994)(referring to the Yankelovich study as "the most credible study to date.")

^{49/} *Yankelovich Monitor: Gay/Lesbian Report*, Demographic Profile, June 9, 1994. The two statistically significant differences were as follows:

* 29% of straight men had a personal income of between \$25,000 and \$50,000 as compared to 13% of gay men.

* 23% of straight men had household incomes of \$50,000-\$100,000 as compared to 9% of gay men.

Moreover, 43% of straight women had household incomes under \$25,000 as compared to 47% of lesbians and 37% of straight women had household incomes of between \$25,000 and \$50,000 as compared to 33% of lesbians.

^{50/} *Id.*; See also M. V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 *Indus. and Labor Relations Rev.* 726 (1995)(finding that "gay and bisexual male workers earned from 11% to 27% less than heterosexual male workers").

The claim that gay people represent an elite, wealthy group who have no need for employment discrimination protection is based on a blatant misrepresentation of the facts. Certainly many gay people avoid discrimination, and retain their jobs, by practicing silence and deceit. But that self-imposed silence is itself a response to feared discrimination and oppression. And for the many gay people who either choose to be honest, or who are involuntarily "found out" by their employers to be gay, there is no effective legal recourse for the blatant employment discrimination that may follow. The claim that these individuals are elite and privileged borders on the absurd.

B. The "Real" Minority Argument

Faced with real-life examples of discrimination against gay people, which necessarily call out for some legislative response, opponents of ENDA resort to a second argument. This argument assumes there may be *some* discrimination against *some* gay people, but asserts that Congress should not take action to prohibit such discrimination. The proposed justification for this striking failure to act is that gay people are not a "real" minority like other minorities who "deserve" civil rights protection.

At times, this argument takes the form of a "comparison" claim. For example, opponents argue that gay people have not suffered *as much* as racial or ethnic minorities and so do not deserve similar federal protection from discrimination.

But the attempt to establish a "hierarchy of oppression" for purposes of civil rights protection is misplaced. Have African-Americans suffered more than women? Have Jews suffered more than African-Americans? Did Congress *weigh* each group's comparative oppression before it added the group to the Civil Rights Act of 1964? No. The relevant

question for Congress has never been: "Who has suffered *more* among various minority groups?" The relevant questions for Congress have always been: "Does discrimination exist? Is such discrimination unjustified?" If Congress found that discrimination existed and that it was unjustified, Congress has appropriately acted in passing legislation prohibiting such discrimination.

Sometimes the argument takes the form of asserting that "real" minorities have "immutable, benign, non-behavioral characteristics," while gay people, by contrast, claim minority status based solely on "behavior" that is mutable and can be overcome.^{51/}

Even were it true that one's sexual orientation is easily mutable (a claim I address below), this argument should be irrelevant for purposes of civil rights legislation. An individual's access to protection under a federal civil rights law has never been tied to whether the individual could "lose" that characteristic by taking certain actions. For example, a person who is Jewish or Muslim could convert to Christianity and thereby avoid discrimination on the part of an employer who wishes to hire only Christians. But Title VII still protects people on the basis of religion. The ability to suppress, or to change, or to hide a particular characteristic, such as one's religion, has *never* been grounds for denying legal protection against discrimination based on that characteristic.

In any event, it is false to say that sexual orientation is "easily mutable." There is broad consensus today in the scientific, medical, and psychological communities that a person's sexual orientation, be it homosexual, heterosexual, or bisexual, cannot be changed through a simple decision-making process undertaken by an adult or through medical or

^{51/} See *Hearings supra* n. 29, at 93 (Statement of Robert H. Knight).

psychological intervention.^{52/} While there is no consensus as to whether an individual's sexual orientation is determined by an individual's genetic makeup, hormonal factors, social environment, or a combination of any of the above, there is a consensus that *none* of the possible factors for establishing orientation are ones ordinarily considered to be under an individual's control.^{53/} Thus, sexual orientation *per se* is not a characteristic which an individual can be said to easily change through simple choice.

Of course, every individual chooses how to *respond* to his or her innate orientation. For example, the scientific evidence suggests that people who are *heterosexual* neither deliberately choose that orientation nor can easily change that orientation through a simple decision-making process or through medical intervention. But such an individual could choose to *refrain* from *acting* upon his or her heterosexual orientation by abstaining from sexual gratification with persons of the opposite gender, and perhaps even by learning how to suppress the desire for such gratification.

The same is true with regard to homosexual or bisexual orientation. Gay people often choose to repress their natural sexual orientation and attempt to live a heterosexual life -- often with tragic consequences for themselves and the families they create.^{54/} By contrast, other gay people follow through on their innate sexual orientation and develop loving

^{52/} See Coleman, *Changing Approaches to the Treatment of Homosexuality*, in *Homosexuality: Social, Psychological and Biological Issues* 81-88 (W. Paul et al. eds., 1982); A. Bell et al., *Sexual Preference: Its Development in Men and Women*, 186-87 (1981); Chandler Burr, *infra* n.53.

^{53/} See Chandler Burr, A Separate Creation: The Search for the Biological Origins of Sexual Orientation 3-48, 79-87 (1996).

^{54/} Feldblum, *Devlin Revisited*, *supra* n.2, at 324-25.

relationships with people of the same gender. Thus, there is of course a behavioral and mutable component to *following through* on one's sexual orientation, although the sexual orientation *itself* is non-behavioral and immutable.

C. The "Immorality" Argument

The core argument of opponents to ENDA thus ultimately rests on their moral vision of society. In this moral vision, the *choice* of gay people to respond *honestly* to their *natural* sexual orientation by engaging in a loving relationship with a person of the same gender is so wrong that it mortally wounds society. In this view, gay people must be punished for that honesty -- and one form that punishment takes is society's choice not to shield them from employment discrimination based on sexual orientation.

But I do not believe this moral view is shared by the majority of the American public. I believe a majority of the American public is probably unaware of what it means to "be gay" and does not realize that many gay people live lives that are completely consonant with the majority moral values of love, caring, and commitment. Because of Americans' unfamiliarity with gay people, many are uncomfortable with homosexuality, and would probably be unhappy and at a loss if their son or daughter revealed they were gay. But, at the same time, a clear majority of the American public still believes it is *wrong* for a gay person to be *fired* from his or her job *simply* because of his or her sexual orientation.^{55/}

This American majority is stating a different moral vision for society. Under this vision, people are to be judged on their merits and not on the basis of a characteristic that

^{55/} Kaplan & Klaidman, *supra* n.4, at 25 (reporting that 84% of Americans oppose discrimination against homosexuals in the workplace); *Dateline* (NBC television broadcast, July 10, 1996)(reporting that 62% of Americans favor equality for homosexuals).

has no relevance to their ability to perform their jobs. Under this vision, gay people are to be *protected* from punishment and harassment based solely on their decision to respond honestly to their given sexual orientation.

Passage of ENDA by Congress would thus be a profoundly *moral* response to the discrimination that currently exists in our nation. The U.S. Supreme Court in *Romer v. Evans* recently invoked that moral spirit when it proclaimed that "the Constitution neither knows nor tolerates classes among citizens."^{56/} In that same spirit, Congress should enact the Employment Non-Discrimination Act of 1995.

I would be happy to answer any questions.

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^{56/} ____ U.S. ____, 116 S.Ct. at 1620 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1986)(dissenting opinion))(internal quotations omitted).

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Patrick McVeigh, Senior Vice President, Franklin Research & Development Corp.
Testimony before the House Committee on Small Business, Subcommittee on Government Programs
July 17, 1996

Testimony before the House Committee on Small Business

Subcommittee on Government Programs

**Patrick McVeigh, Senior Vice President
Franklin Research & Development Corp.**

July 17, 1996

Good morning Mr. Chairman and other distinguished members of this committee. My name is Patrick McVeigh, and I am Senior Vice President and Director of Social Research for Franklin Research & Development Corporation. Franklin is a Boston-based investment firm with three offices in Massachusetts, California and North Carolina. We manage close to \$500 million in combined assets for institutional and individual clients. We also publish a monthly publication, *Franklin's Insight*, that reports on social and environmental issues facing corporations, as well as the financial bottom line.

Thank you for the opportunity to testify today in support of the Employment Non-Discrimination Act of 1996.

We support the Employment Non-Discrimination Act because we believe emphatically that harassment and discrimination do not belong in the workplace. At every level of the corporation, employees deserve to work in an environment where their dignity as human beings is respected, and where they are evaluated, promoted and rewarded solely upon their professional performance.

From my own experience as a manager at Franklin, I can testify that having a non-discrimination policy significantly improves employee morale, loyalty and productivity. Our policy conveys that our employee's sexual orientation will not be considered a factor in hiring, promotions or performance evaluations; they need not fear retribution simply for being gay or lesbian. Their lives and our business would be a much different place if our gay and lesbian employees lived every day in fear of discrimination or harassment. It would be unethical on our part to stand by as these employees suffered needlessly, and it would be foolish from a business perspective because personal stress ultimately impairs job performance. That is why in our view, companies that fail to offer real protection from discrimination or harassment are not just hurting their employees, but they are also hurting themselves and, ultimately, their shareholders as well. Discrimination can be a subtle but not insignificant hidden labor cost.

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 July 17, 1996

Conversely, non-discrimination policies make good business sense. Congress should pass the Employment Non-Discrimination Act because a well-enforced non-discrimination law will have the net effect of discouraging the discriminatory behaviors that burden individuals, diminish morale and productivity, and give rise to costly grievances and lawsuits.

In our view, the presence of a sexual orientation non-discrimination policy is a signal that a company is better positioned to benefit fully from the diversity of the American workforce. It sharpens a corporation's edge as it competes for the best talent. This will become even more critical in the years to come, because younger generations of gay, lesbian and bisexual Americans are increasingly unwilling to conceal their identities as a condition for employment, and the gay community is paying unprecedented attention in the 1990s to corporate policies addressing their workplace concerns. The most farsighted businesses recognize that they must be positioned to hire and retain the best talent, and that means committing to a workplace environment in which harassment and discrimination are not tolerated. These are a few reasons why as investors, we look more favorably upon these companies for inclusion in our clients' portfolios.

The recognition that equitable policies serve business interests is the clear reason why hundreds of businesses have implemented non-discrimination policies — businesses a cross-section of industries, from Bethlehem Steel to Harley Davidson to Coca-Cola. Hundreds of employers now grant domestic partnership benefits, including several dozen prominent, publicly-traded companies like Coors, Nynex and the Time Warner family. The impetus to adopt sexual orientation non-discrimination policies has come from employees, human resource managers, officers and board directors, consumers, and other stakeholders of the corporation.

Publicly-traded corporations have also started to hear from stockholders who are willing to file shareholder resolutions to advance equal rights for gay men and lesbians in the workplace — stockholders as diverse as the New York City pension fund, several orders of the Sisters of Mercy, and ourselves. When shareholder resolutions calling for a non-discrimination policy were vote on at Cracker Barrel Old Country Stores, the restaurant chain that had fired eleven employees explicitly for being gay, they drew the support of large institutional investors like the California, Connecticut, and New Jersey state pension funds, the Dreyfus funds, and TIAA-CREF.

There is another, particularly timely benefit to American business from this bill. By strengthening the obligation of employers to treat workers fairly, the Employment Non-Discrimination Act will help to reduce the pervasive sense of insecurity that workers are feeling in this era of reorganization and downsizing. In the current climate, workers are looking for real signs that their hard work will be valued and rewarded. This is something that this bill can do without imposing

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 Testimony before the House Committee on Small Business, Subcommittee on Government Programs
 July 17, 1996

any hiring goals, recruitment obligations, or other components of affirmative action programs more appropriate to other forms of discrimination.

In fact, the fairness and simplicity of this bill is one of its most compelling features. Affirmative action is not mandated by this bill. It contains no reporting requirements, and imposes no regulation. It does not compel employers to grant spousal benefits. The Employment Non-Discrimination Act simply embodies the principle of non-discrimination that already enjoys the wide support of the American people. Americans have mixed feelings about homosexuality, but there is little confusion about where the public stands when it comes to job discrimination. In repeated surveys, Americans support laws protecting gay men and lesbians from discrimination in the workplace.

And yet it is currently the situation that in 41 states and all but 200 or so cities and towns, it is still perfectly legal to fire someone simply because of their sexual orientation, as Cracker Barrel did. Unfortunately, Cracker Barrel is not exceptional in this regard. Anti-gay harassment and discrimination in the workplace is widespread, as other witnesses before this committee have documented. And the personal stories behind the statistics tell of a wide array of behavior – from insulting remarks to violent attacks – that would interfere with anyone's ability to perform their job comfortably and securely. It is also worth noting that each year, thousands of hate crimes against sexual minorities are reported. It would be naive to think that the perpetrators of these crimes do not bring their hateful attitudes into the workplace. While some business leaders have responded, most working Americans remain unprotected. There is an urgent need for Congressional action.

In summary, Mr. Chairman, the Employment Non-Discrimination Act is legislation that will, if enacted, benefit American businesses and all of their employees. Discrimination is unjust. It is contrary to the American values of fairness, equality and a level playing field for all. It costs too much for business. Americans support the principle of non-discrimination, and so should their Congress.

Thank you for your attention.

Testimony of
Nan Miguel
Grangeville, Idaho

Before the
Small Business Subcommittee on Government Programs
Regarding the Employment Non-Discrimination Act
July 17, 1996

Chairman Torkildsen and members of the committee, thank you for having me here today. I'm grateful for this opportunity to tell my story, but I must admit that I wish it weren't necessary. In my family, we were raised to live by the Golden Rule. We were taught to treat others as we would like to be treated ourselves. If everyone guided their behavior by that simple but profound idea, we wouldn't need laws like the Employment Non-Discrimination Act. Unfortunately, people don't always treat each other fairly. For that reason, there are millions of hard-working, taxpaying Americans who need the protection afforded by this bill.

Frankly, I was shocked to learn that no federal law prohibits job discrimination on the basis of sexual orientation. Like most people, I assumed that the law protected everybody from this kind of discrimination. I learned the hard way that this just isn't so. Today, in the United States of America, you can do your job, do it well, play by the rules -- and still have your livelihood snatched away from you because of someone else's prejudice.

And this doesn't just happen to our fellow Americans who are gay or lesbian. It also happened to me. I stood up to harassment and discrimination directed at a young woman in my workplace -- and for that, I was also forced out of a job that I did well.

I was recruited to manage the radiology department at a hospital in Pullman, Washington, just over the state line from my home in Moscow, Idaho. At first, we were extremely understaffed, to the point where I was often working alone, handling all the ultrasound work, performing all the mammograms and doing all the paperwork. I even slept in the hospital on call overnight. It was tough, but I loved the opportunity to help people. And I got the opportunity to learn how to be a good manager.

Eventually, our staff grew to accommodate the workload, and I was able to concentrate more on quality assurance and developing new services. In 1993, I had the opportunity to hire an additional technologist. Among the job applicants was a bright young woman whom I will call M.J. She was registered in obstetrical and gynecological ultrasound, and had the kind of experience we needed to complement our staff. I asked my medical director, who was a physician with privileges at our hospital, to phone the doctors M.J. had listed as references. He reported that her references were good, so I invited her in for an interview, which went very well. But almost immediately after M.J. left, the other technologists began snickering about her. They joked about how obvious it was that this woman was gay. As far as I was able to determine, they based this on the way she dressed and looked. I saw nothing unusual about her. She was intelligent, kind of quiet, and seemed eager for the job.

Before I even hired her, the medical director came to me for a little "heart to heart" conversation behind closed doors. He told me that some of the technologists thought M.J. was gay, and he didn't think that I should hire her. I told him it was nobody's business whether she was gay or not. As a manager, I believe that you can't make a decision on whether to hire or fire someone based on something like that. You have to put aside your personal prejudices and judge people based on their qualifications and job performance.

For those very reasons, I hired M.J. for the job. Soon thereafter, the medical director complained that the ultrasound department was -- quote -- "overstaffed." This despite the fact that the department was well within the revenue goals outlined by the administration, and we were finally able to handle the workload that I had carried alone for so long.

The medical director never gave M.J. a break. He made it plain that he was irritated by her very presence -- even though she did her job, and did it well. He was exceedingly rude to her in front of other people. He refused to review her cases, or even write an evaluation of her performance so she could understand what he wanted of her.

M.J. tried to meet him halfway. She did her best to treat him the way she thought she ought to be treated. She asked me for my advice, and I suggested that she be sure to give him more space, always be polite no matter how rude he was, and to give precise patient histories whenever he asked. She did all that, and more. But it didn't make any difference.

The medical director began a campaign to drive M.J. out of the hospital. He began to claim that she was incompetent. I disagreed with him, based on my experience in the field, but verified my opinion with another radiologist who knew her work. This radiologist said M.J. was performing her job quite well and was diligent in serving the patients. M.J.'s job performance didn't matter to the doctor. He started shouting at her, and at me as well.

I wrote a letter to the hospital administration, describing the medical director's behavior. His harassment and abuse was disrupting our workplace, and I was afraid it would jeopardize the care of our patients. When I went in to discuss the problem with the assistant administrator, he said, "Don't you think he's just responding to the level of discord in your department?" I couldn't believe it. It was the doctor who was causing the discord. But here was M.J., a hardworking, quiet young woman who wanted nothing more than to do her job, being blamed for this man's unprofessional conduct.

As if it weren't clear enough, the reason for the doctor's displeasure with

M.J. became crystal clear one day when she had the day off. The medical director bought ice cream for the staff, and when I asked him what the occasion was, he said they were celebrating because M.J. wasn't there. Then he added, "It's Gay Pride Week. She's probably off marching in a parade somewhere."

He obviously wasn't shy about making his prejudices known. And he didn't care that his behavior disrupted our workplace and made life miserable for this hardworking young woman. I continued to have conversations with the hospital administrators, but they refused to place responsibility where it belonged — on the discrimination practiced by the doctor.

Instead, they blamed me. I was called into a meeting to discuss the problems in my department. I was told that no progress had been made since I had first brought the situation to their attention. And they said it would be easier to remove me than to remove the medical director. So I was placed on a three-month administrative leave.

Meanwhile, M.J.'s hours were reduced. She filed a grievance, seeking to return to full-time status. Instead, she was fired.

Then, four days after Christmas in 1994, the hospital administrator called me and said there was no longer a place for me at the hospital.

There is no documentation anywhere in my personnel file of any wrongdoing on my part. It seems clear to me that I lost my job because I refused to join in the discrimination aimed at a member of my staff.

And you know what? I don't even know whether M.J. was gay or not. I never asked her. It doesn't matter to me. She was a quiet, hard-working woman who simply wanted to do her job and live her life in peace. She ought to have a right to do that, whether she is gay or lesbian or heterosexual. Those things just shouldn't matter in the workplace.

Since this terrible experience, M.J. has moved to another state and tried to pull her life back together. I have moved on with my career, but some of my old friends at the hospital are afraid to be seen with me, because they have to continue to work with that medical director. He caused the problem, but he kept his job.

For me, this was a frustrating and disheartening episode. This kind of discrimination violates the Golden Rule that I was raised to live by, and it undermines the values that we as a country ought to be governed by. I would simply ask the committee to help put things right and pass a law against this kind of discrimination.

Thank you very much.

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CO-CHAIR

Hon. Connie Morella

Testimony before the Small Business Subcommittee on Government Programs

Hearing on H.R. 1863, the Employment Non-Discrimination Act

July 17, 1996

Mr. Chairman, I appreciate this opportunity to testify before your Subcommittee today in strong support of H.R. 1863, the Employment Non-Discrimination Act. I am pleased to be one of the sponsors of this bill, along with Congressman Studds and you, Mr. Chairman. And, I know that Congressman Campbell would have been one of the original cosponsors as well had he been in office when we introduced the bill last year.

Mr. Chairman, this bipartisan bill simply prohibits employment discrimination based on sexual orientation. It creates no "special rights" -- rather, it protects only the fundamental right to be judged on one's own merits.

The bill exempts religious organizations and businesses with fewer than fifteen employees, prohibits preferential treatment and does not require an employer to provide benefits to domestic partners. It does not apply to the uniformed members of the armed forces.

It has been endorsed by a broad coalition that includes hundreds of civil rights leaders, religious leaders, and labor and business leaders. Its supporters include Coretta Scott King and Barry Goldwater. Senator Goldwater has stated: "Job discrimination excludes qualified individuals, lowers workforce productivity and eventually hurts us all...It's not just bad -- it's bad business." And, indeed, you have assembled a panel of business representatives who will be testifying to that this legislation is good for American business.

My own county, Montgomery County, Maryland, has had a much broader law in place since 1984, one that prohibits discrimination based on sexual orientation in employment, housing, public accommodations, and services.

Today's bill is much more narrowly drawn to apply only to employment. Our country is founded on the basic tenet that individuals should be treated equally and should all have the same opportunities to excel. I believe that a government that respects individual rights and which does not intrude into the private lives of individuals is a government that best represents our country's founding principles.

Mr. Chairman, I appreciate this opportunity to reaffirm my strong support for this important legislation, and I commend you for holding this hearing. I am sorry that I won't be able to stay for the remainder of the hearing, but I also commend you for assembling such an excellent group of witnesses, many of whom will be describing the very real discrimination that is occurring in the workplace across the country, and the positive impact this legislation will have on our businesses and our nation.

TESTIMONY

Michael Proto
North Haven, Connecticut

Before the Committee on Small Business
Subcommittee on Government Programs
Washington, D.C.
July 17, 1996

Mister Chairman and members of the Committee, thank you for hearing my story today.

I'm not here because I have a need for others -- especially an employer -- to know about my personal life. But an employer's inquiries into my personal life disclosed information it would not otherwise have known, and I was discriminated against because of it.

In truth, I would prefer to keep my personal life just that -- personal. But, this is an incredibly important issue and I hope I can help bring about an understanding of the need for the Employment Non-Discrimination Act.

I graduated with high honors from Quinnipiac College in Hamden, Connecticut, and worked for the international accounting firm Ernst & Young for five years. I passed the CPA exam in 1987. I was living a comfortable life at a very young age, but felt compelled to make a greater contribution to my community.

So, I returned to school seeking a Master's degree in Criminal Justice Administration at the University of New Haven where I have remained in excellent standing.

In 1994, I began the process of competing for the position of Police Officer with the Hamden, Connecticut police department. After a battery of written exams, physical agility tests and oral interviews, I was informed that I earned the highest score on the civil service test and, overall, ranked among the top 7 candidates set to start at Connecticut's police academy in April, 1995. I received a written offer of employment.

As a condition of employment, I submitted to a polygraph test. During a series of personal questions on that test -- all of which I answered truthfully -- I disclosed the fact that I am gay.

A few weeks later, I realized that I had been passed over for the job when others in line to begin at the academy -- including those who had not ranked as high as I had -- received orders to report for duty.

I was initially told that Hamden's Police Chief decided not to hire me -- but that only he knew why. I then received a letter from the Town stating that I did not meet its "standards." But, according to the standards established for the job, I was obviously qualified.

Upon my insistence, I met with the Chief of Police, who told me that an investigation of my background had, in some way, raised questions about my integrity. A follow up letter from the Town also indicated the background check may have been a problem.

However, I have determined that a background check was never completed. Former employers have confirmed to me that they were not contacted. Friends, neighbors, and personal references were not contacted, there was no credit inquiry and so on. I have subsequently taken a position with a program of the United States Department of Justice. Interestingly, a thorough Federal investigation of my background appropriately adjudicated me.

As I said, I have gotten another job. I'm grateful that the U. S. Department of Justice recognized that abilities and talents are the appropriate considerations in a hiring decision. But, the fact that a job offer was revoked following a polygraph test creates suspicion. I have had to explain the incident over and over again, sacrificing my privacy, so that my reputation would not be in question.

I have never been provided with an explanation as to why my job offer was revoked. But, the fact is, every piece of evidence I have gathered points to the real reason -- discrimination. A type of discrimination which is, in fact, illegal in my state.

But, some people will go to extreme efforts to discriminate. In a sworn statement, the Chief said he didn't know about disclosures on the polygraph test because it was conducted by the State Police, not his department. But, when the state's Freedom of Information Commission ordered him to turn over the polygraph report the State Police prepared for him, sure enough, what the very first paragraph said of me was, "he is gay." It's unbelievable to me that an entire police department's integrity and credibility would be compromised simply to carry out discrimination against one person who just wanted to be of service.

And, when the Chief was ordered to turn over the psychological assessment I had undergone, I found it concluded that I was suitable for the job. In fact, psychological tests I have submitted to state that I have a "very superior" IQ, the "ability to reach high levels of professional competence in the public safety field," and that my abilities make me a "candidate for special units, such as hostage negotiating."

When the New Haven Register printed my story, it polled its readers with the question, "should gays be allowed to be Police Officers?" Every response printed the next day was positive, but one stood out. A woman named Connie from Stratford, Connecticut responded that it was a shame the town would be denied the services of a "potentially excellent" Police Officer because of discrimination. What Connie recognized was, this was not just about me. This was about the entire community and how it loses when one person's abilities are senselessly and discriminately set aside.

What we're talking about today is not just about any individual or a subset of our society, it's about the entire country, tapping into every available resource, regardless of who it comes from, and making it move.

I merely competed for a job that, by all objective standards, I was highly qualified for. But, because of discrimination, I have had to defend my character and reputation against an unwarranted attack. The only way I could have avoided this scenario, would have been to not seek out the opportunity in the first place -- unfortunately, I think that happens a lot. That doesn't make this country move forward, it holds it still.

When my Grandparents came here from their native Italy, they had nothing but the promise of opportunity. In exchange for that promise, they vowed to make a contribution to their new country. They indoctrinated me with the responsibility to carry on that vow, but I don't think they ever contemplated that one of their children or grandchildren would be denied the promise.

I ask this Committee to please support this bill to send a clear message that America is still about moving forward and its promise is still within the reach of all its citizens.

Thank you.

TESTIMONY

Karen Solon

Falls Church, Virginia

Employment Non-Discrimination Act

Small Business Committee

Subcommittee on Government Programs

July 17, 1996

Mister Chairman and distinguished members of the committee. Thank you for giving me this opportunity to share with you my experiences and beliefs regarding the problem of job discrimination. I have learned -- through painful personal experience -- that one does not need to be gay oneself, but simply a family member or supporter, to suffer discrimination in the workplace.

I am not gay. I am happily married to a wonderful man, and we are very proud of our four grown children. I am also a deeply religious person, brought up to believe in the inherent worth and dignity of every person. Working for social justice and equality is an expression of that principle.

I have devoted my life to the care of children. I began my professional career in a Head Start program, but for over 17 years I combined my family and career goals by opening a family day care business in my home. I co-founded the Northern Virginia Family Day Care Association, which has grown to a membership of 500 dedicated professionals, committed to providing quality child care for Northern Virginia's working families. In addition, I voluntarily participated in several county programs in order to provide care for children with a variety of physical, mental, emotional, and financial needs. In 1991, Fairfax County Office for Children awarded me special recognition for exceptional service and excellence in providing child care for children with special needs.

Underlying my life choices is my belief in a moral and civic responsibility to care about all children, regardless of their differences. For the same reason, I am a member of an organization called Parents, Families and Friends of Lesbians and Gays, commonly known as PFLAG. Founded by parents, it provides a much needed support to its members. I came to recognize the need for such an organization because of the pain and prejudice suffered by people close to me.

Four and a half years ago, my family took into our home a high school senior, who was homeless and estranged from her abusive family. We have come to love her as a daughter. Later, this bright, ambitious and talented young woman went off to college on a full ROTC scholarship. But coming to terms with her identity as a lesbian during her freshman year meant giving up both the scholarship and her dream of becoming a career military nurse, in order to live her life with honesty and integrity. She has new dreams. She will travel next month to Romania to work in an orphanage there. But when she gets back, the prejudice of others will continue to pose a potential obstacle to her future dreams and job security.

Two childhood friends have recently confided to me the pain and isolation of

growing up gay in our rural New England village. Both have spent their lives aware of the constant danger of harassment, violence, and discrimination. I joined PFLAG for them, for my daughter, and for the untold millions of lesbian and gay people who need their families and friends to stand up for them.

I never dreamed that my membership in PFLAG could cost me a job. But it did.

Last year, with my children grown, I decided to close my successful day care business to work outside my home. Because of my experience and qualifications, I was soon offered, and accepted, a position at a local child development center.

That same day, however, I received a phone call from the director of a pre-school in my neighborhood, inviting me to interview for a position. The position would offer me more money, better hours, a location within walking distance of my home, and a chance to learn new skills.

Needless to say, I was excited about this turn of events. The next morning, she called and asked me to visit the school for a classroom observation. I snatched up my coat and ran off. I had a wonderful morning with both staff and children.

In the afternoon when I down to talk with her. The first thing she said, with a long face, was, "Tell be about the button." At first I was puzzled, but then I realized she was referring to a pin on the lapel of my overcoat, draped over a nearby chair. It identified me as a member of PFLAG. In retrospect, I wish it had occurred to me to remove it before showing up for the interview. I firmly believe that teachers should not wear their personal beliefs on their sleeve in the workplace. We are bound by professional ethics to leave our social, political and religious activities at the school house door.

When I told her how it happened to be on my overcoat, she asked me how I got involved in the issue. I hesitated, wondering what this had to do with my job. But she had asked, and at the time I saw no reason not to answer honestly. She proceeded to offer me the job, but her tone and manner clearly reflected lingering reservations. But I decided to let it go, confident that my performance in the classroom would eventually prove that my beliefs would not interfere with my work.

Three days later, the school director stopped by my house to drop off some documents I needed to fill out. On my front steps was a stack of our local gay newspapers that was destined for delivery to my church, to be included with other materials. I had volunteered to bring the papers to church, and they had been dropped off on my steps that day. I explained that to the

director, and she left the forms with me.

The next evening, she called me at home to revoke the job offer. She said my support of gay and lesbian people was too controversial. She acknowledged that I had discussed my beliefs with her only at her request, but that didn't matter. I was out of a job.

To say the least, I was stunned, and even frightened. I was being denied the opportunity to do a job that I do well — and denied it for a reason that had nothing to do with my qualifications. All my years of experience, dedication and hard work meant nothing. Activities undertaken at church and in my private life could be used to deny me the chance to serve my community and earn a living.

I lost this job because I had revealed, however inadvertently, a belief in the inherent dignity and worth of people I care about. Through this experience, I came to know the isolation, pain and fear that many gay and lesbian people must feel, having to go through life in danger of losing their jobs just for being who they are. It just isn't fair.

I understand that there are people of faith who may disagree with my religious belief on this issue. The freedom for each of us to believe differently according to our own conscience is very precious to me. But in the context of the workplace, we must put such differences aside and treat each other fairly. The purpose of the workplace is to do one's job, to do it well and to contribute to the success of the enterprise, no matter what it is. Government has a responsibility to ensure that some people's personal beliefs do no impinge on the right of others to earn a living.

Luckily for me, the child development center that had offered me a job in the first place welcomed me back. I continue to do the work that I love. And I believe, more firmly than ever, that our laws must reflect the moral, ethical and spiritual imperative that we human beings must treat each other fairly, regardless of our differences. That is why I am here today to ask you to pass the Employment Non-Discrimination Act.

Thank you for listening.

Statement of
The Honorable Gerry E. Studds

Before the United States House of Representatives
Committee on Small Business
Subcommittee on Government Programs

In support of H.R. 1863,
The Employment Non-Discrimination Act

July 17, 1996

Thank you, Mr. Chairman. It is a privilege to appear here today with Congresswoman Morella and Congressman Campbell, to speak in support of the Employment Non-Discrimination Act (ENDA).

Only thirteen months ago, you and I joined with Senators Jeffords, Kennedy and Chafee, and Representatives Frank and Morella, in introducing this bill. Today, it enjoys the support of 30 cosponsors in the Senate and 135 in the House, and President Clinton has pledged to sign it into law.

I commend you for holding this hearing and for cosponsoring the bill, and I would also like to thank the eight other members of the Small Business Committee who have signed on as cosponsors of this legislation: Representatives Kelly, Jackson, Clayton, Meehan, Velázquez, Hilliard, Luther, and -- as of this morning -- Congressman Blumenauer as well.

Over the past three decades, the Congress has enacted a series of statutes to safeguard the fundamental rights of all Americans, regardless of race, religion, gender,

national origin, age or disability. This is a legacy to be cherished and celebrated. Yet as we look at how far we have come as a society, we see also how far we have still to go.

Discrimination persists even where forbidden by statute. And, as you will hear from a number of the witnesses this morning, there are millions of Americans who to this day have no legal protection from discrimination at all. Every day, lesbian, gay, and bisexual Americans -- and others who are perceived to be -- suffer job discrimination for which they have no legal recourse.

That is why we have introduced the Employment Non-Discrimination Act. The Act is clear and direct. It confers no "special" rights or privileges. Rather, it affirms that workers are entitled to be judged on the strength of the work they do, and should not be deprived of their livelihood because of the prejudice of others.

This is a principle with which every American can identify. Millions came to these shores in search of opportunity -- the opportunity to build a decent life through one's own hard work and ingenuity. I believe that when our fellow citizens learn how frequently lesbians and gay men are denied that chance, they will agree that something must be done.

Indeed, it is hard to understand how any fair-minded person could reach any other conclusion. When, some two years ago, the House debated the President's proposal to lift the military ban on lesbians and gay men, a majority of our colleagues opposed the proposal on the ground that military life is fundamentally different from life as most of us know it. In their zeal to bolster this claim to uniqueness, some Members hastened to assure us that the exclusion of gay people from the special domain of military life did not mean that they should be subject to similar discrimination in civilian life. This bill takes them at their word -- it protects civilian employees and exempts, among others, members of the Armed Forces. I hope that those of my colleagues who relied on that argument during the military debate will join us now in supporting the bill.

I am pleased -- but not surprised -- to see that the bill has gained the support of so many within the business community, from small start-up companies to Fortune 100 corporations. Hundreds of companies had already adopted non-discrimination policies when our bill was still on the drawing board. The bill is about civil rights, and enlightened employers recognize and respond to that. But it is also about productivity -- the productivity our country will need if it is to prosper in today's global economy. That is why such prominent business leaders as Warren Phillips, the former Chairman of Dow Jones & Company, have endorsed the bill. As Mr. Phillips testified before the Senate Labor Committee when Senator Kennedy and I first introduced the bill in 1994, "It would be self-defeating for us, and American business generally, to limit the talent

pool because of prejudice. Morally wrong, yes. But also poor business, for us and for the country."

I welcome the support of so many of my colleagues and the scores of business, labor, civil rights and religious leaders who have endorsed this legislation. I am confident that the Act will also continue to find broad support within the business community and among decent, hardworking Americans from every walk of life.

This bill will not be enacted by the 104th Congress. But it will become law. The history of the civil rights struggle in this country teaches us that such goals are not achieved quickly or easily. After all, the equality envisioned in the Constitution pertained only to white men of property. Women could not own property, and people of color were property. It was a century after President Lincoln signed the Emancipation Proclamation that President Johnson signed the Civil Rights Act of 1964. Indeed, it is in memory of Lincoln's proclamation that I asked that this bill be designated H.R. 1863. It is a beginning -- the beginning of a new page in what I believe to be the final chapter in the long history of the civil rights movement in this country.

Some will say, as they did during last week's floor debate on the "Defense of Marriage Act," that this is not a civil rights issue -- that it is wrong for gay and lesbian Americans to claim kinship with the great struggle of African Americans for freedom

and equality. One does not hear this principally from African Americans -- indeed, from Coretta Scott King to the Leadership Conference on Civil Rights, to the overwhelming majority of the Congressional Black Caucus, leaders of the African American community and other communities of color understand the profound continuities, as well as the obvious differences, between the ongoing campaign for racial equality and the struggle being waged by gay and lesbian Americans. Most of those who profess outrage at the comparison are individuals who took no part in the civil rights struggle -- who did not march, as I did, with Dr. King from Selma to Montgomery. They celebrate those victories only after they have become an indelible fact of history, and behave today as though the struggle for racial equality is over.

That struggle is far from over, but it has achieved a hard-won consensus among right-thinking Americans that racial discrimination is wrong, as slavery was before it. Our struggle has a long way to go before we achieve a similar degree of public understanding. But achieve it we will, and together we will write the last chapter in our nation's long journey toward justice and equality for all. Thank you.

Before the United States Congress
Small Business Committee of the House of Representatives
Subcommittee on Government Programs

The Honorable Peter G. Torkildsen, Chairman

Testimony of

Dana Priesing
Congressional Advocacy Coordinator
GenderPAC

July 17, 1996

My name is Dana Priesing, and I serve as GenderPAC's Congressional Advocacy Coordinator. GenderPAC is an informal association representing a number of organizations and associations which share a common interest in halting discrimination against diversity — particularly the natural human diversity in gender characteristics, behavior, expression and identity. On behalf of GenderPAC, I want to thank Representative Torkildsen for holding this hearing on the subject of H.R. 1863, the Employment Non Discrimination Act (ENDA), and for providing GenderPAC and other interested parties with an opportunity to submit statements concerning ENDA. GenderPAC strongly supports ENDA, and applauds Representative Torkildsen and his colleagues in the House of Representatives who are sponsoring this important legislation.

The Value of ENDA

GenderPAC believes that the merit of ENDA arises from its application of two basic principles with which most Americans agree. First, there seems to be widespread agreement that all Americans who can work, should work. Those of us who agree with this principle share a responsibility to eliminate unreasonable obstacles to putting capable Americans to work. ENDA is valuable because it removes such an obstacle, namely discrimination based on sexual orientation.

The second widely agreed-upon principle underlying ENDA is that it is fundamentally unfair to subject someone to job discrimination because of personal characteristics that have nothing to do with qualifications, ability or performance.^{1/} ENDA is valuable because it eliminates workplace

¹ Some argue that sexual orientation is not a characteristic, but a behavior, or a propensity to engage in behavior. My impression is that current research supports the view that sexual orientation is an innate characteristic, whether or not manifested in behavior — but the relevant principle should apply whether or not one agrees. It is equally unfair to subject someone to job discrimination because of personal *behavior* that has nothing to do with qualifications, ability or performance.

discrimination based on a characteristic that is unrelated to qualification, ability or performance, namely sexual orientation.

By applying these two basic principles to the treatment of sexual orientation (whether heterosexual, homosexual or bisexual) in the workplace, ENDA will foster a more productive American economy. Millions of Americans will be able to more closely approach their full potential on the job, free of unjust harassment and discrimination. Co-workers and management who formerly wasted valuable time and effort identifying, stigmatizing and harassing capable employees based on their sexual orientation will instead be encouraged to focus on legitimate company business.

ENDA Fails to Protect Transgendered Employees

Valuable as ENDA is, however, in its current form it would fail to protect the many thousands of Americans who suffer from job discrimination because they are or appear to be "transgendered." By "transgendered," I mean persons who, in their own or someone else's opinion, manifest characteristics, behavior or expression typical of or commonly associated with persons of another gender. The term is most commonly used to refer to persons who have gender identities (a characteristic) which diverge from that typical of members of their chromosomal sex, and who consequently may spend time occasionally, or indeed, live most of their lives, in a gender role consistent with their gender identity rather than their chromosomal sex.² The term "transgendered"

² It is useful in discussions of this sort to distinguish between chromosomal sex (XX, XY or variants), biological sex (primary and secondary sex characteristics), gender identity (sense of one's gender), gender role (the ensemble of benefits, burdens and responsibilities associated with living as a man or woman in our society), and sexual orientation (preference as to the sex of one's sex partner). We tend to assume, uncritically, that these five variables always are in accord. It is not uncommon, however, to encounter persons for whom one or more of such variables are consistent with our notions of one gender, while the other variables are not.

includes not only transsexuals and cross-dressers, but also hermaphrodites and intersexed persons. Because ENDA addresses only the issue of sexual orientation, none of these persons would be protected against discrimination directed against them as transgendered persons.

I hope the Committee will forgive the use of a few examples to clarify my meaning. Suppose a senior vice president is discovered attending a "drag" event, and is summarily dismissed. Suppose a postal worker transitions from one gender role to another, then undergoes sex reassignment surgery, and is harassed mercilessly, and develops stress-related symptoms leading to partial disability and lost job time. Suppose the best qualified, but intersexed, secretarial candidate fails to get the job because the interviewer finds such people distasteful.

In each of these examples the discrimination is unrelated to the victim's qualifications, ability or performance. In each, the bias is directed against the victim's transgendered characteristic, behavior or expression. And in each case, ENDA, as currently drafted, would leave the victim without protection, because the discrimination is unrelated to the victim's sexual orientation. As a result, people who could work, and who — most Americans would agree — *should* work, might find themselves economically marginalized, unable to realize their full potential, and our economy would lose the benefit of their productivity.

The Solution: Revise ENDA's Definition of "Sexual Orientation"

The omission of transgendered persons from ENDA could be remedied by broadening Section 17(9), ENDA's definition of sexual orientation, to include gender characteristics, behavior, expression or identity, regardless of chromosomal sex. Of course, such an expanded definition should make clear that manifesting transgendered characteristics, behavior or expression neither

would excuse non-performance of the essential functions of an employee's job, nor shelter violations of law in the workplace, e.g., sexual harassment, rape, or public indecency. Moreover, a provision should be added requiring a reasonable accommodation when an employee is capable of performing the essential functions of an employment position at issue (with or without a reasonable accommodation), notwithstanding the fact that he or she manifests a transgendered characteristic, behavior, expression or identity.

Protecting transgendered persons against job discrimination would not be unprecedented. The discrimination at issue arises from the application of stereotypical notions of what having a particular chromosomal or birth sex entails. Arguably the application of such stereotypes is nothing but sex discrimination in another guise.³ Numerous jurisdictions in the United States have recognized that transgendered persons need protection in the workplace, including the State of Minnesota,⁴ and the cities of Iowa City, Iowa; Minneapolis, Minnesota; New York, New York; San Francisco and Santa Cruz, California; and Seattle, Washington. Outside the United States,

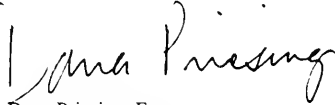
³ Compare *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775 (1989) (application of sex-based stereotyping in partnership decisionmaking process constituted sex discrimination). I am aware of the line of judicial decisions, holding that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), does not protect transsexuals. See, e.g., *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984). Whether or not *Ulane* and similar cases correctly interpreted Title VII, common sense suggests that it is sex discrimination to act based on stereotypical notions of how human sexuality must be manifested. Judicial decisions interpreting anti-discrimination provisions other than Title VII have begun to recognize this. See, e.g., *Maffei v. Kolaeton Industry Inc.*, S. Ct. N.Y. Cnty., New York Law Journal, 1A, Part 19, at 26 (March 17, 1995) (New York City ordinance barring sex discrimination in employment covers transsexual).

⁴ M.S.A. §§ 363.01 Subd. 45 (defining "sexual orientation" as including "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness") & 363.03 Subd. 1(2) (prohibiting employment discrimination based on sexual orientation).

workplace discrimination against transsexuals now is unlawful in the member states of the European Community, and in New South Wales, Australia. As transgendered persons become more visible in society, the trend has begun toward protecting them against job discrimination. It is time for Congress to do likewise.

The United States stands at a crossroads as it nears the end of the 20th Century. Will it enter the next millennium as a society that welcomes the contributions of all of its citizens, so that it may benefit from the diversity that is its greatest strength? Or will its various communities balkanize, dehumanizing and attacking one another, until society devolves into a social zero sum game, and the country becomes a place of incivility and prisons? ENDA deserves passage, and ENDA should include transgendered people, because America needs the full productivity of *all* its citizens — straight, gay, lesbian, bisexual, and transgendered.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Dana Priesing". The signature is fluid and cursive, with a large initial "D" and a long, sweeping underline.

Dana Priesing, Esq.
Congressional Advocacy Coordinator
GenderPAC

APPENDIX I
EMPLOYMENT DISCRIMINATION CASES

TABLE OF CONTENTS

I.	CASES ALLEGING VIOLATIONS OF THE U.S. CONSTITUTION.	1
A.	GENERAL.	1
B.	CASES ALLEGING EQUAL PROTECTION VIOLATIONS.	2
1.	GOVERNMENT EMPLOYMENT CASES (FEDERAL).	2
2.	GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).	2
3.	PRIVATE EMPLOYMENT CASES.	5
4.	PRISONER CASES.	6
C.	CASES ALLEGING DUE PROCESS VIOLATIONS.	6
1.	GOVERNMENT EMPLOYMENT CASES (FEDERAL).	6
2.	GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).	7
3.	PRIVATE EMPLOYMENT CASES	8
4.	PRISONER CASES	8
D.	CASES ALLEGING RIGHT OF PRIVACY VIOLATIONS	8
1.	GOVERNMENT EMPLOYMENT CASES (FEDERAL).	8
2.	GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).	8
3.	PRIVATE EMPLOYMENT CASES.	9
E.	CASES ALLEGING FREEDOM OF ASSOCIATION VIOLATIONS.	9
1.	GOVERNMENT EMPLOYMENT CASES (FEDERAL).	9
2.	GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).	10
3.	PRIVATE EMPLOYMENT CASES.	11
F.	CASES ALLEGING FREEDOM OF SPEECH/EXPRESSION	11
1.	GOVERNMENT EMPLOYMENT CASES (FEDERAL).	11
2.	GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).	11
3.	PRIVATE EMPLOYMENT CASES.	13
G.	CASES ALLEGING FREEDOM OF RELIGION VIOLATIONS.	13
1.	GOVERNMENT EMPLOYMENT CASES (FEDERAL).	13
2.	GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).	13
3.	PRIVATE EMPLOYMENT CASES.	13
II.	CASES BROUGHT UNDER STATE CONSTITUTIONS.	13
A.	GOVERNMENT EMPLOYMENT CASES.	13
B.	PRIVATE EMPLOYMENT CASES.	15

III.	CASES ALLEGING VIOLATIONS OF FEDERAL STATUTES.	15
A.	CASES BROUGHT UNDER 42 U.S.C. § 2000e (TITLE VII).	15
1.	GOVERNMENT EMPLOYMENT CASES (FEDERAL).	15
2.	GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).	15
3.	PRIVATE EMPLOYMENT CASES.	15
4.	PRISONER CASES.	19
B.	CASES BROUGHT UNDER 42 U.S.C. § 1983.	19
1.	GOVERNMENT EMPLOYMENT CASES (FEDERAL).	19
2.	GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).	19
3.	PRIVATE EMPLOYMENT CASES.	20
4.	PRISONER CASES.	20
C.	CASES BROUGHT UNDER OTHER FEDERAL STATUTES.	20
1.	GOVERNMENT EMPLOYMENT CASES (FEDERAL).	20
2.	GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).	21
3.	PRIVATE EMPLOYMENT CASES.	21
IV.	CASES BROUGHT UNDER STATE/MUNICIPAL STATUTES.	21
A.	GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).	21
B.	PRIVATE EMPLOYMENT CASES.	22
V.	CASES BROUGHT UNDER STATE CONTRACT, TORT OR OTHER CAUSES OF ACTION.	26
A.	GOVERNMENT EMPLOYMENT CASES.	26
B.	PRIVATE EMPLOYMENT CASES.	26
VI.	CIVIL SERVICE COMMISSION CASES.	28
VII.	CASES INVOLVING REVOCATION OR DENIAL OF A GOVERNMENT SECURITY CLEARANCE.	30
A.	GOVERNMENT EMPLOYMENT CASES.	30
B.	PRIVATE EMPLOYMENT CASES.	33
VIII.	PRISONER CASES.	36
IX.	BISEXUAL HARASSER CASES	37
X.	UNANALYZED CASES	41

TABLE OF CONTENTS

I.	CASES ALLEGING VIOLATIONS OF THE U.S. CONSTITUTION.	1
A.	GENERAL.	1
B.	CASES ALLEGING EQUAL PROTECTION VIOLATIONS.	2
1.	GOVERNMENT EMPLOYMENT CASES (FEDERAL).	2
2.	GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).	2
3.	PRIVATE EMPLOYMENT CASES.	5
4.	PRISONER CASES.	6
C.	CASES ALLEGING DUE PROCESS VIOLATIONS.	6
1.	GOVERNMENT EMPLOYMENT CASES (FEDERAL).	6
2.	GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).	7
3.	PRIVATE EMPLOYMENT CASES	8
4.	PRISONER CASES	8
D.	CASES ALLEGING RIGHT OF PRIVACY VIOLATIONS	8
1.	GOVERNMENT EMPLOYMENT CASES (FEDERAL).	8
2.	GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).	8
3.	PRIVATE EMPLOYMENT CASES.	9
E.	CASES ALLEGING FREEDOM OF ASSOCIATION VIOLATIONS.	9
1.	GOVERNMENT EMPLOYMENT CASES (FEDERAL).	9
2.	GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).	10
3.	PRIVATE EMPLOYMENT CASES.	11
F.	CASES ALLEGING FREEDOM OF SPEECH/EXPRESSION	11
1.	GOVERNMENT EMPLOYMENT CASES (FEDERAL).	11
2.	GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).	11
3.	PRIVATE EMPLOYMENT CASES.	13
G.	CASES ALLEGING FREEDOM OF RELIGION VIOLATIONS.	13
1.	GOVERNMENT EMPLOYMENT CASES (FEDERAL).	13
2.	GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).	13
3.	PRIVATE EMPLOYMENT CASES.	13
II.	CASES BROUGHT UNDER STATE CONSTITUTIONS.	13
A.	GOVERNMENT EMPLOYMENT CASES.	13
B.	PRIVATE EMPLOYMENT CASES.	15

III.	CASES ALLEGING VIOLATIONS OF FEDERAL STATUTES.	15
A.	CASES BROUGHT UNDER 42 U.S.C. § 2000e (TITLE VII).	15
1.	GOVERNMENT EMPLOYMENT CASES (FEDERAL).	15
2.	GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).	15
3.	PRIVATE EMPLOYMENT CASES.	15
4.	PRISONER CASES.	19
B.	CASES BROUGHT UNDER 42 U.S.C. § 1983.	19
1.	GOVERNMENT EMPLOYMENT CASES (FEDERAL).	19
2.	GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).	19
3.	PRIVATE EMPLOYMENT CASES.	20
4.	PRISONER CASES.	20
C.	CASES BROUGHT UNDER OTHER FEDERAL STATUTES.	20
1.	GOVERNMENT EMPLOYMENT CASES (FEDERAL).	20
2.	GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).	21
3.	PRIVATE EMPLOYMENT CASES.	21
IV.	CASES BROUGHT UNDER STATE/MUNICIPAL STATUTES.	21
A.	GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).	21
B.	PRIVATE EMPLOYMENT CASES.	22
V.	CASES BROUGHT UNDER STATE CONTRACT, TORT OR OTHER CAUSES OF ACTION.	26
A.	GOVERNMENT EMPLOYMENT CASES.	26
B.	PRIVATE EMPLOYMENT CASES.	26
VI.	CIVIL SERVICE COMMISSION CASES.	28
VII.	CASES INVOLVING REVOCATION OR DENIAL OF A GOVERNMENT SECURITY CLEARANCE.	30
A.	GOVERNMENT EMPLOYMENT CASES.	30
B.	PRIVATE EMPLOYMENT CASES.	33
VIII.	PRISONER CASES.	36
IX.	BISEXUAL HARASSER CASES	37
X.	UNANALYZED CASES	41

EMPLOYMENT DISCRIMINATION CASES

The following case summaries represent an extensive sampling of the types of actions and decisions that have focused on allegations of employment discrimination based on sexual orientation. Cases involving members of the U.S. Armed Forces have been excluded. It is organized by cause of action into eight separate sections, each containing either a summary or a cross-reference to a summary of each case which considered that cause of action. The cases are summarized in chronological order within each section, with the most recent cases appearing first. A tenth section lists cases that have not yet been analyzed for this study.

I. CASES ALLEGING VIOLATIONS OF THE U.S. CONSTITUTION.

A. GENERAL.

1. ***Bush v. Potter (1989)***. Prisoner held to have no constitutionally protected interest in a prison job. Summarized in prisoner cases section.

2. ***Burton v. Cascade School District (1975)***. Peggy Burton was a teacher at Cascade High School in Oregon. During her second year of teaching, the Cascade School Board became aware of the fact that Peggy was a "practicing" lesbian and fired her under an Oregon statute that allowed teachers to be dismissed for "immorality." Burton challenged her dismissal under 42 U.S.C. § 1983 as a violation of her federal constitutional rights (no specific right cited).

The U.S. District Court for Oregon found the statute, which did not define immorality, to be unconstitutionally vague. It awarded Burton monetary relief but refused to reinstate her to her teaching position. The U.S. Circuit Court of Appeals for the Ninth Circuit affirmed the decision, holding that since Burton was a probationary employee whose annual contract could be left unrenewed by the school district for any good cause reason, her legal interest in her position was not strong enough to warrant reinstatement given the disruption it would cause at the school. The Ninth Circuit expressly declined to address the question of whether or not the school system could refuse to rehire Burton because of her sexual orientation. Cite: *Burton v. Cascade Sch. Dist. Union High Sch. No. 5*, 512 F.2d 850 (9th Cir.), cert. denied. 423 U.S. 839 (1975).

3. ***Brass v. Hoberman (1968)***. Ronald Brass and Frederick Teper applied for state civil service positions as caseworkers for the New York City Department of Social Services. Both passed the required written and medical examinations, but were turned down when their interviews revealed histories of homosexuality. Brass and Teper sought a preliminary injunction prohibiting the department from enforcing its policy of not allowing gays and lesbians to serve as caseworkers, claiming the policy lacked a rational relationship to a legitimate government interest and thus was arbitrary and capricious discrimination in violation of their federal constitutional rights (no specific right cited).

The U.S. District Court for the Southern District of New York denied the preliminary injunction. The court reviewed conflicting psychiatric affidavits provided by each side regarding the emotional stability, maturity and general suitability of gay people for caseworker duties and found that Brass and Teper had not been able to demonstrate that the Department's actions lacked a rational basis. Cite: *Brass v. Hoberman*, 295 F. Supp. 358 (S.D. N.Y. 1968).

B. CASES ALLEGING EQUAL PROTECTION VIOLATIONS.

1. GOVERNMENT EMPLOYMENT CASES (FEDERAL).

a. *Buttino v. Federal Bureau of Investigation (1992)*. Case settled prior to final adjudication of equal protection claim. Summarized in security clearance related cases section.

b. *Doe v. Gates (1992)*. Equal protection claim rejected. Summarized in security clearance related cases section.

c. *United States Information Agency v. Krc (1992)*. Equal protection claim rejected. Summarized in security clearance related cases section.

d. *Doe v. Cheney (1989)*. Equal protection claim alleged but not decided. Summarized in security clearance related cases section.

2. GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).

a. *Equality Foundation of Greater Cincinnati v. City of Cincinnati (1995)*.

In 1991 the City of Cincinnati passed an Equal Employment Opportunity Ordinance which prohibited the City from discriminating in its hiring practices on the basis of various classifications including sexual orientation. This EEO Ordinance was followed by a Human Rights Ordinance passed in 1992 which prohibited sexual orientation discrimination in housing and public accommodations, as well as employment. A lobbying group called Equal Rights Not Special Rights, then proposed a City Charter Amendment (the "Amendment") which provided that the City could not enact or adopt any regulation or ordinance which provided that homosexual, lesbian or bisexual orientation entitled a person to "any claim of minority or protected status." The proposed Amendment was placed on the November 1993 ballot, and passed with 62% of the vote.

The Equality Foundation, and several individual gay people, filed a complaint against the City under 42 U.S.C. § 1983, which alleged that their constitutional rights had been, or would potentially be violated by the adoption of the amendment. Plaintiffs sought temporary and permanent injunctive relief, a declaration that the Amendment was unconstitutional, and an award of costs (including attorney's fees) under 42 U.S.C. § 1988.

The district court found for the plaintiffs, holding that the Amendment infringed upon their fundamental right to equal access to the political process, as well as their First Amendment rights of free speech and association, and the right to petition the government for redress of grievances.

The Court of Appeals for the Sixth Circuit reversed and remanded the case, holding that the repeal of certain sections of the Human Rights Ordinance which had protected gay people was unconstitutional because the Equal Protection Clause did not compel the City to enact legislation to protect gay people from discrimination. The court also found that the district court's application of heightened scrutiny was misplaced because under *Bowers v. Hardwick*, gay people did not constitute a suspect or quasi-suspect class. Additionally, the court held that because the First Amendment prohibited only governmental burdens on speech and association, the Amendment did not prohibit private citizens from discriminating against gay people for public gay-oriented speech or association.

The reviewing court concluded that because the Amendment implicated no suspect or quasi-suspect class, and burdened no fundamental right, the rational relationship test was appropriate. Under this test, the court found that the Amendment furthered many valid community interests, including returning the municipal government to a position of neutrality on the issue and reducing government regulation of the private, social and economic conduct of Cincinnati residents. Cite: *Equality Foundation of Greater Cincinnati v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3831 (U.S. Jun. 17, 1996) (No. 95-239), (judgment vacated, case remanded to 6th Cir.)

b. *Shahar v. Bowers (1993)*. Equal protection claim rejected. Summarized in freedom of association based cases section.

c. *Jantz v. Muci (1992)*. Vernon Jantz began work as a part time teacher with the Kansas school system in 1987. During the 1988-89 school year he applied for a full time position and was turned down based on the recommendation of Muci, the principal at the high school where Jantz worked. Jantz sued Muci in federal court, claiming his recommendation was based on his belief that Jantz was gay and that the decision infringed upon his federal constitutional right to equal protection of the laws in violation of 42 U.S.C. § 1983.

The district court rejected Muci's motion for summary judgment, holding the evidence presented by Jantz was sufficient to present a triable issue of fact regarding whether a central factor in Muci's decision was his belief that Jantz was gay. It also rejected Muci's claim for qualified immunity for acts taken as a state official, holding that Muci could not be considered to have been acting within the scope of his office because by that time it had been established as a matter of law that there was no rational basis for blanket sexual orientation-based employment discrimination. Cite: *Jantz v. Muci*, 759 F. Supp. 1543 (D. Kan. 1991).

The U.S. Court of Appeals for the Tenth Circuit reversed, holding the issue of whether there was a rational basis for excluding gay people from teaching positions was an open question of law at the time of Muci's recommendation. Thus, Muci's claim of qualified immunity was valid and he was protected from being sued as an individual for his actions. It further held the school district could not be held liable since the school board, not Muci, possessed the final authority for the decision and the school board had acted unaware of the discriminatory basis that allegedly influenced Muci's recommendation. Cite: *Jantz v. Muci*, 976 F.2d 623 (10th Cir. 1992).

d. *Dawson v. State Law Enforcement Division (1992)*. Equal protection claim rejected. Summarized in right of privacy section.

e. *Delahoussaye v. City of New Iberia (1991)*. David Delahoussaye was a police officer working for the City of New Iberia who had been laid off for economic reasons. He was scheduled to be reemployed by the city's police department when the department learned Delahoussaye had been detained previously for allegedly engaging in sex acts in a public restroom. After a hearing, the city found Delahoussaye had engaged in the alleged acts and removed his name from its civil service reemployment list. Delahoussaye sued the city, claiming that its actions violated his federal constitutional rights of due process and equal protection of law.

The U.S. District Court for Louisiana granted summary judgment in favor of the city. The court held that "rational basis" review was the appropriate standard to apply and that the city's action was rationally related to a legitimate government interest in protecting the police department from acts prejudicial to the department and to the public interest. The U.S. Court of Appeals for the Fifth Circuit affirmed, adopting the district court's reasoning. Cite: *Delahoussaye v. City of New Iberia*, 937 F.2d 144 (5th Cir. 1991).

f. *Rowland v. Mad River Local School District (1983)*. Marjorie Rowland worked as a non-tenured high school guidance counselor. She was suspended from her position with pay after she told her colleagues of her bisexuality and disclosed to her secretary the sexual orientation of two students whom she had counseled. Rowland was not rehired by the school district when her contract expired, and she alleged she was constructively discharged because of her sexual orientation. Rowland challenged her dismissal in federal court, claiming she was deprived of her federal constitutional rights of equal protection of law and freedom of speech in violation of 42 U.S.C. § 1983.

A jury found, inter alia, that: 1) Rowland's firing was at least partially motivated by her statements regarding her bisexuality; 2) these comments did not interfere with her ability to perform her duties or with the operation of the school, and; 3) she had been treated differently than similarly situated heterosexual employees. Based on these findings, the district court found the school district had violated Rowland's constitutional rights of freedom of speech and equal protection.

The Court of Appeals for the Sixth Circuit reversed the lower court's equal protection decision, holding Rowland had not demonstrated her sexual orientation was the sole basis for her discharge and that sufficient justification for her dismissal existed in the jury's finding that the decision not to rehire Rowland was at least partially motivated by her improper disclosure of her students' sexual orientation. It also reversed the district court's holding on freedom of speech, finding that Rowland's statements were private comments to fellow workers, rather than public statements on an issue of public concern, and thus were not constitutionally protected. Cite: *Rowland v. Mad River Local Sch. Dist.*, 730 F. 2d 444 (6th Cir. 1984), cert. denied, 470 U.S. 1009 (1985).

g. *Childers v. Dallas Police Department* (1981). Equal protection claim rejected. Summarized in due process related cases section.

h. *Acanfora v. Board of Education* (1974). Equal protection claim upheld. Summarized in freedom of expression section.

3. PRIVATE EMPLOYMENT CASES.

a. *DeMuth v. Miller* (1995). Donald DeMuth was fired from his job as a professional management consultant because he spoke on television as a representative of a local gay and lesbian coalition. After his discharge, DeMuth started a competing business. His former employer brought suit against him for damages for breach of a non-competition agreement. DeMuth argued that enforcement of the non-competition agreement would violate public policy as well as federal and state doctrines of equal protection and due process.

The Court of Common Pleas enforced the non-competition agreement and entered a judgment against DeMuth in the amount of \$110,000. The Superior Court affirmed, finding that enforcement of the agreement did not contravene public policy, any Pennsylvania statute, the Pennsylvania constitution, or the U.S. Constitution. The court specified that employment discrimination on the basis of sexual orientation is not actionable under the U.S. Constitution. Cite: *Demuth v. Miller*, 652 A.2d 891 (Pa. Super. Ct. 1995).

b. *Wolotsky v. Huhn* (1992). Steven Wolotsky worked as a licensed social worker with Portage Path Community Mental Health Clinic, a private, non-profit corporation providing mental health counseling services under contract to the State of Ohio. He was terminated without warning or hearing when a patient alleged that Wolotsky had engaged in sex with him. Wolotsky sued his former employer in federal court, claiming his federal constitutional rights to due process and equal protection were infringed in violation of 42 U.S.C. §§ 1983 & 1985. The court granted partial summary judgment against Wolotsky on all federal claims and dismissed on jurisdictional grounds several remaining tort claims.

The U.S. Court of Appeals for the Sixth Circuit affirmed, holding that Portage Path's ties to the state were sufficiently attenuated that its actions could not be described as taken

under the color of state law as required by § 1983 and the due process and equal protection clauses of the Fourteenth Amendment. The § 1985 based claim was rejected on the grounds that, although § 1985 protects against private discrimination, Wolotsky had failed to allege he was discriminated against because of race or other class-based considerations, as required by § 1985. Cite: *Wolotsky v. Huhn*, 960 F.2d 1331 (6th Cir. 1992).

c. *Moshi v. Bally Corporation (1990)*. Ramona Moshi alleged she was fired from her position with the Bally Corporation because she was a lesbian. She challenged her dismissal in the U.S. District Court for the Northern District of Illinois under 42 U.S.C. §§ 1981 & 1983, alleging her dismissal infringed her federal constitutional rights of due process and equal protection and under the First Amendment. The court dismissed her claim, holding that § 1983 and the constitutional provisions she invoked in support of her claim protected only against state, not private discrimination, and that § 1981's protections applied only to race- or ethnicity-based discrimination. Cite: *Moshi v. Bally Corp.*, No. 90 C 788, 1990 U.S. Dist. LEXIS 1838 (N.D. Ill. Feb. 16, 1990).

d. *High Tech Gays v. Defense Industrial Security Clearance Office (1990)*. Equal protection claim rejected. Summarized in security clearance related cases section.

4. PRISONER CASES.

a. *Kelley v. Vaughn (1991)*. Equal protection claim allowed to proceed. Summarized in prisoner cases section.

b. *Johnson v. Knable (1991)*. Prisoner held to have potentially cognizable equal protection claim. Summarized in prisoner cases section.

C. CASES ALLEGING DUE PROCESS VIOLATIONS.

1. GOVERNMENT EMPLOYMENT CASES (FEDERAL).

a. *Buttino v. Federal Bureau of Investigation (1992)*. Due process claim rejected. Summarized in security clearance related cases section.

b. *Doe v. Gates (1992)*. Due process claim rejected. Summarized in security clearance related cases section.

c. *United States Information Agency v. Krc (1992)*. Due process claim rejected. Summarized in security clearance related cases section.

d. *Doe v. Cheney (1989)*. Due process claim rejected. Summarized in security clearance related cases section.

e. *Ashton v. Civiletti (1979)*. Donald Ashton worked for the FBI for two years in a clerical position. When the Bureau learned Ashton was gay, he was forced to resign to avoid being dismissed for cause. He challenged his constructive dismissal in federal court, claiming the FBI's action violated his federal constitutional right of due process of law because he was terminated without a hearing and because there was no rational basis for the FBI's action.

The district court rejected Ashton's challenge, holding that his property interest in his employment was not sufficient to warrant a hearing prior to dismissal. The U.S. Court of Appeals for the D.C. Circuit reversed and remanded, finding the FBI's treatment of Ashton prior to his dismissal justified his belief that he would be discharged only for a work-related cause. Neither court reached the issue of whether or not the FBI had a rational basis for dismissing Ashton because he was gay. Cite: *Ashton v. Civiletti*, 613 F.2d 923 (D.C. Cir. 1979).

f. *Society for Individual Rights v. Hampton (1975)*. Due process claim upheld. Summarized in Civil Service Commission cases section.

2. GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).

a. *Shahar v. Bowers (1993)*. Due process claim rejected. Summarized in freedom of association cases section.

b. *Delahoussaye v. City of New Iberia (1991)*. Due process claim rejected. Summarized in equal protection cases section.

c. *Childers v. Dallas Police Department (1981)*. Steven Childers sought a promotion from his storekeeper's job with the City of Dallas Water Department to a higher level position with the Property Division of the City Police Department. He took the civil service exam for the position twice, scoring higher than any other person on his first attempt and even higher on the second. He was granted interviews with a police official on both occasions and each time his application was denied solely as a result of Childers' admission during the interview that he was gay and participated in gay community activities. Childers challenged the department's refusal to hire him based on his sexual orientation, claiming such refusal violated his federal constitutional rights of freedom of expression and association, due process and equal protection.

The U.S. District Court for the Northern District of Texas acknowledged the infringement of Childers' rights, but found the police department's action was justified by its desire to prevent conflict within the department and to protect its public image, and by concerns over Childers' ability to handle evidence from cases involving gay people. Cite: *Childers v. Dallas Police Dept.* 513 F. Supp. 134. (N.D. Tex. 1981), *aff'd*, 669 F.2d 732 (5th Cir. 1982).

d. *Gish v. Board of Education (1976)*. Due process claim rejected. Summarized in freedom of expression related cases section.

e. *Acanfora v. Board of Education (1974)*. Due process claim upheld. Summarized in freedom of expression cases section.

3. PRIVATE EMPLOYMENT CASES.

a. *DeMuth v. Miller (1995)*. Due process claim rejected. Summarized in equal protection cases section.

b. *Wolotsky v. Huhn (1992)*. Due process claim rejected. Summarized in equal protection cases section.

c. *Moshi v. Bally Corporation (1990)*. Due process claim dismissed. Summarized in equal protection cases section.

d. *High Tech Gays v. Defense Industrial Security Clearance Office (1990)*. Due process claim rejected. Summarized in security clearance related cases section.

e. *Adams v. Laird (1969)*. Due process claim rejected. Summarized in security clearance related cases section.

4. PRISONER CASES.

a. *Kelley v. Vaughn (1991)*. Due process claim rejected. Summarized in prisoner cases section.

D. CASES ALLEGING RIGHT OF PRIVACY VIOLATIONS.

1. GOVERNMENT EMPLOYMENT CASES (FEDERAL).

Of the 68 cases analyzed for purposes of this study, none has raised a right of privacy claim. Thirty-nine additional cases (listed in Section X) have not yet been reviewed.

2. GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).

a. *Walls v. City of Petersburg (1990)*. Teyonda Walls was an administrator with Petersburg's alternative sentencing program for non-violent criminals. When the program was shifted from the City Manager's Office to the City's Bureau of Police, all employees were required to undergo a security check. Walls refused to answer four questions put to her during her security interview, including one asking whether she had ever had sex with a person of the same gender. She was dismissed from her position as a result.

Walls, an African American, challenged her dismissal in federal court as racially discriminatory based on the argument that African Americans were more likely to respond adversely to the four questions she refused to answer. She based her challenge to the sexual conduct question on the federal constitutional right of privacy and 42 U.S.C. § 1983.

The district court granted summary judgment against Walls on all counts and the U.S. Court of Appeals for the Fourth Circuit affirmed, holding the City had demonstrated a compelling interest in seeking the information requested by each question. Regarding the sexual conduct question, the court held her constitutional right to privacy and § 1983 claims were foreclosed by the Supreme Court's decision in *Bowers v. Hardwick*. Cite: *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990).

b. *Dawson v. State Law Enforcement Division (1992)*. Marvin Dawson was forced to resign from his position with the South Carolina State Law Enforcement Division (SLED) after a fellow employee discovered him masturbating in private with her husband. He filed a grievance with a state grievance adjudication committee as required by South Carolina law. The committee found Dawson's termination was based on his alleged attempts to intimidate the fellow employee following the incident. Dawson challenged the decision in the U.S. District Court for South Carolina, claiming his termination was actually because SLED believed he was gay and that this violated his federal constitutional rights of privacy and equal protection.

The court found that even if SLED had terminated Dawson for homosexual conduct, *Bowers v. Hardwick* established that the constitutional right to privacy did not extend to such conduct. The court also held that Dawson's equal protection claim failed because his discharge could be justified as rationally related to SLED's need to maintain order, discipline and mutual trust within its organization. Cite: *Dawson v. State Law Enforcement Div.*, No. 3:91-1403-17, 1992 U.S. Dist. LEXIS 8862 (D. S.C. April 3, 1992).

3. PRIVATE EMPLOYMENT CASES.

a. *Gayer v. Schlesinger (1973)*. Right of privacy claim upheld. Summarized in security clearance related cases section.

E. CASES ALLEGING FREEDOM OF ASSOCIATION VIOLATIONS.

1. GOVERNMENT EMPLOYMENT CASES (FEDERAL).

Of 68 cases analyzed, none has raised a freedom of association claim. Thirty-nine additional cases have not yet been reviewed.

2. GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).

a. *Shahar v. Bowers (1993)*. Robin Shahar was a recent law school graduate who applied for and was offered a position with the State of Georgia's Department of Law. When Attorney General Michael Bowers learned that Shahar had engaged in a Jewish marriage ceremony with another woman prior to commencing her position, he ordered the offer of employment withdrawn. Shahar challenged Bower's action in the U.S. District Court for the Northern District of Georgia, claiming it violated her federal constitutional rights of freedom of association, religion, due process and equal protection.

The district court granted summary judgment to Bowers on all grounds. The court rejected Shahar's freedom of association claim, holding that although Bowers' decision restricted her freedom of association, this restriction was outweighed by the state's interest in not endorsing conflicting interpretations of Georgia law regarding gay and lesbian relationships and conduct and by the department's need to employ attorneys able to exercise discretion and judgment in their personal lives. It applied the same rationale in rejecting her free exercise of religion claim, applying a balancing test pitting the state's claimed interest against Shahar's interest. Rejecting Shahar's equal protection claim, the court held that Bowers' withdrawal of the offer of employment did not constitute employment discrimination because it was not based on sexual orientation but was motivated instead by Shahar's actions, which were inconsistent with Georgia law. The court also held Shahar's due process claim was without merit because, except as already noted, Shahar did not allege that a constitutionally protected interest had been infringed. Cite: *Shahar v. Bowers*, 836 F. Supp. 859 (N.D. Ga. 1993).

On appeal, an Eleventh Circuit Court of Appeals panel vacated in part the district court's decision. Applying strict scrutiny, the Circuit panel agreed with Shahar that although her relationship did not involve marriage in civil, legal sense, it was inextricably entwined with her exercise of her religious beliefs. The panel also held that the attorney general withdrew Shahar's offer of employment based on her same-sex marriage and that he, as a result, did not violate any equal protection rights Shahar "may have had" based on a sexual orientation classification. Cite: *Shahar v. Bowers*, 70 F.3d 1218 (11th Cir. 1995).

The full Eleventh Circuit, on March 8, 1996, vacated the panel's opinion and ordered a rehearing en banc. Cite: *Shahar v. Bowers*, 78 F.3d 499 (11th Cir. 1996).

b. *Endsley v. Naes (1987)*. Pat Endsley worked as an unpaid deputy for the Saline County Sheriff's Department in Kansas. Shortly after she began working, rumors began to circulate that she and another female deputy were lesbians. As a result of these rumors and a confrontation with the other woman's husband, Endsley either quit or was told to resign from her position. Endsley sued the County and Sheriff's Department for sex [not sexual orientation] discrimination under Title VII. She also claimed her federal and state constitutional rights of freedom of association had been infringed in violation of 42 U.S.C. § 1983.

The district court granted summary judgment against Endsley on all federal claims and dismissed the pendent state claim. In rejecting the Title VII claim, the court held that, if she had been dismissed, it was because of her sexual orientation, not her gender. Rejecting the constitutional and § 1983 claims, the court found that the department would have been justified in dismissing her to protect its internal working relationships and external relationships with the local community. Cite: *Endsley v. Naes*, 673 F. Supp. 1032 (D. Kan. 1987).

c. *Childers v. Dallas Police Department (1981)*. Freedom of association claim rejected. Summarized in due process cases section.

d. *Aumiller v. University of Delaware (1977)*. Freedom of association claim made but not reached in decision. Summarized in freedom of expression section.

e. *Gish v. Board of Education (1976)*. Freedom of association claim rejected. Summarized in freedom of expression cases section.

3. PRIVATE EMPLOYMENT CASES.

a. *High Tech Gays v. Defense Industrial Security Clearance Office (1990)*. Freedom of association claim rejected. Summarized in security clearance cases section.

F. CASES ALLEGING FREEDOM OF SPEECH/EXPRESSION VIOLATIONS.

1. GOVERNMENT EMPLOYMENT CASES (FEDERAL).

a. *Singer v. United States Civil Service Commission (1976)*. Freedom of expression claim rejected. Summarized in Civil Service Commission cases section.

2. GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).

a. *Equality Foundation of Greater Cincinnati v. City of Cincinnati (1995)*. Summarized in equal protection cases section.

b. *Rowland v. Mad River Local School District (1983)*. Freedom of expression claim rejected. Summarized in equal protection cases section.

c. *Childers v. Dallas Police Department (1981)*. Freedom of expression claim rejected. Summarized in due process cases section.

d. *Aumiller v. University of Delaware (1977)*. Richard Aumiller was an openly gay faculty member at the University of Delaware who worked primarily as a director and manager in the University's theater and performing arts division. When Aumiller's

contract expired in 1976, the University refused to rehire him because he had voluntarily participated in a series of articles written about gay life in Delaware and at the University. The University feared that Aumiller's advocacy would be detrimental to the University's reputation.

Aumiller challenged the University's decision in federal court on the grounds that it violated his federal constitutional rights of freedom of expression and association. The U.S. District Court for Delaware found that since the University was unable to show that Aumiller's statements were false, adversely affected his performance or disrupted University operations, the decision not to rehire him violated his constitutional right of freedom of expression. The court did not reach the freedom of association claim. The court ordered Aumiller reinstated with back pay and awarded him compensatory damages for emotional distress. Cite: *Aumiller v. Univ. of Delaware*, 434 F. Supp. 1273 (D. Del. 1977).

a. *Gish v. Board of Education (1976)*. John Gish was a high school teacher in Paramus, New Jersey. Seven years after Gish joined the high school he began to assume a prominent leadership position in a statewide gay activist organization. As Gish's activities became increasingly more prominent, the Paramus Board of Education ordered Gish to undergo a psychiatric examination, invoking a New Jersey statute that gave it broad authority to order teachers to undergo physical and mental examinations. Gish refused, challenging the order as without basis since the board did not allege he had acted improperly in the classroom or toward any student. Gish also challenged the order as violating his rights of freedom of speech, association and due process of law under the federal and New Jersey constitutions.

Gish pursued administrative appeals of the decision through the State Commissioner of Education, then challenged the decision in the Appellate Division of the New Jersey Superior Court. The court rejected his claims, holding the school's responsibility for determining the fitness of teachers outweighed any potential infringement on Gish's freedom of speech or association and that the specific violations of due process he alleged -- his inability to cross-examine two psychiatrists who advised the board that Gish presented a potential mental health risk and the right to an impartial hearing -- were not applicable to the hearings in question since they resulted in no penalty or sanction. *Gish v. Board of Educ. of Paramus*, 366 A.2d 1337 (N.J. Super. Ct. App. Div. 1976), cert. denied, 377 A.2d 658 (N.J.), cert. denied, 434 U.S. 879 (1987).

b. *Acanfora v. Board of Education (1974)*. Joseph Acanfora was transferred from his position as an eighth grade school teacher to a non-teaching position when his principal discovered he was gay. He challenged his transfer in federal district court, claiming it violated his constitutional rights (none specifically cited) and thus was a violation of 42 U.S.C. § 1983. Acanfora subsequently gave interviews to local and national media representatives regarding his case and his sexual orientation.

The district court found that transferring Acanfora before his sexual orientation became widely known violated his constitutional rights of due process and equal protection. It declined to order his reinstatement, however, holding the school was justified in maintaining him in a position where he would not serve as a potential role model for children once his sexual orientation had become widely known as a result of the case. *Acanfora v. Board of Educ.*, 491 F. Supp. 843 (D. Md. 1973).

The U.S. Court of Appeals for the Fourth Circuit affirmed on different grounds. It found that Acanfora's public statements were protected by his federal constitutional right to freely express his views on a public issue, but that his intentional failure to list his membership in a gay organization on his application for a teaching position was a sufficient basis for his transfer. Cite: *Acanfora v. Board of Educ.*, 491 F.2d 498 (4th Cir.), cert. denied, 419 U.S. 836 (1974).

3. PRIVATE EMPLOYMENT CASES.

Of 68 cases analyzed, none has raised a freedom of expression claim. Thirty-nine additional cases have not yet been reviewed.

G. CASES ALLEGING FREEDOM OF RELIGION VIOLATIONS.

1. GOVERNMENT EMPLOYMENT CASES (FEDERAL).

Of 68 cases analyzed, none has raised a freedom of religion claim. Thirty-nine additional cases have not yet been reviewed.

2. GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).

a. *Shahar v. Bowers (1993)*. Freedom of religion based claim rejected. Summarized in freedom of association cases section.

3. PRIVATE EMPLOYMENT CASES.

Of 68 cases analyzed, none has raised a freedom of religion claim. Thirty-nine additional cases have not yet been reviewed.

II. CASES BROUGHT UNDER STATE CONSTITUTIONS.

A. GOVERNMENT EMPLOYMENT CASES.

1. *City of Dallas v. England (1993)*. Mica England applied for a position with the Dallas Police Department and was invited for an interview. During the interview,

England was asked about her sexual orientation and she responded she was a lesbian. England was told by the interviewer that police department hiring policy prohibited the hiring of gay men and lesbians because their conduct violated provisions of the Texas Penal Code that prohibited "deviate sexual intercourse." England challenged the department's hiring policy and the underlying criminal statute in state court, seeking a declaration that they violated her state constitutional rights of privacy, due process and equal protection. She also sought an injunction prohibiting the enforcement of the policy and the criminal statute.

Relying on the then valid precedent of *Texas v. Morales*, 826 S.W.2d 957 (Tex. App. 1992), (statute outlawing "deviate sexual intercourse" violates gay people's right of privacy under the Texas Constitution), rev'd, *Texas v. Morales*, 869 S.W.2d 941 (Tex. 1994) (reversed and remanded with instructions to dismiss on grounds that the case presented a hypothetical controversy which the courts lacked jurisdiction to adjudicate), the trial court granted summary judgment to England on her constitutional claims. The Court of Appeals of Texas rejected the City's appeal and affirmed the lower court's ruling. The Texas Supreme Court dismissed the City's appeal on procedural grounds without reaching the merits of the case. Cite: *City of Dallas v. England*, 846 S.W.2d 957 (Tex. Ct. App. 1993).

2. ***Merrick v. Board of Higher Education (1992)***. Harriet Merrick was employed by the State of Oregon's Board of Higher Education. Merrick, a lesbian, sought a judicial declaration regarding the validity of regulations promulgated by the Board which forbid its educational institutions from using sexual orientation as a basis for employment discrimination. Merrick asked the court to determine whether the Board's regulations conflicted with a regulation derived from a ballot measure (Measure 8) that forbid any state official from making it impermissible to take a personnel action against a state employee based on sexual orientation. She argued that Measure 8 was itself invalid because it violated the free speech and equal privileges and immunities provisions of the Oregon Constitution and the free speech and equal protection guarantees of the U.S. Constitution.

The Court of Appeals for Oregon first reviewed the regulations in question and determined that an actual conflict existed, then proceeded to an evaluation of the constitutionality of the Measure 8 derived regulation. It held that the sweeping nature of the Measure 8 regulation would have the effect of repressing the speech of gay men and lesbians under the Board's authority as well as their ability to associate with other gay and lesbian people and political groups, and thus was invalid because it violated the Oregon Constitution. None of Merrick's other state and federal constitutional challenges to Measure 8 was reached by the court. Cite: *Merrick v. Board of Higher Educ.*, 841 P.2d 646 (Ore. Ct. App. 1992).

3. ***Endsley v. Naes (1987)***. State constitution freedom of association claim dismissed. Summarized in federal constitution freedom of association section.

4. ***Gish v. Board of Education (1976)***. State freedom of association, expression and due process claims rejected. Summarized in freedom of expression related cases section.

B. PRIVATE EMPLOYMENT CASES.

1. *DeMuth v. Miller (1995)*. Anti-discrimination claim brought under Pennsylvania state constitution rejected. Summarized above in equal protection cases section.
2. *Gay Law Students Association v. Pacific Telephone and Telegraph Co. (1979)*. Claim based on equal protection clause of California Constitution upheld. Summarized in cases brought under state law section.

III. CASES ALLEGING VIOLATIONS OF FEDERAL STATUTES.

A. CASES BROUGHT UNDER 42 U.S.C. § 2000e (TITLE VII).

Title VII to the Civil Rights Act of 1964 prohibits discrimination in employment practices by an employer. Unlike 42 U.S.C. § 1983, it does not require that the discrimination be taken under color of state law or that the discrimination violate a constitutional or federal law. Its protections are extended to a list of enumerated classifications of people, specifically prohibiting employment discrimination based on "race, color, religion, sex, or national origin."

1. GOVERNMENT EMPLOYMENT CASES (FEDERAL).

Of 68 cases analyzed, none has raised a Title VII claim. Thirty-nine additional cases have not yet been reviewed.

2. GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).

- a. *Endsley v. Naes (1987)*. Title VII claim rejected. Summarized in freedom of association section.

3. PRIVATE EMPLOYMENT CASES.

- a. *Quick v. Donaldson Co., Inc. (1995)*. Over the course of two years, Phil Quick was repeatedly harassed, fondled, and assaulted by fellow workers who were under the false impression that he was gay. On at least 100 occasions Quick was "bagged," which was what his co-workers called grabbing and squeezing his testicles. Co-workers also wrote the word "queer" on his identification card and left tags containing extremely offensive references in Quick's work area.

Describing the co-workers' behavior as "hooliganism," the U.S. District Court for the Southern District of Iowa rejected Quick's Title VII sexual harassment claim, holding that Title VII does not provide protection against discrimination based on sexual orientation. In so doing the court denied Title VII protection to victims of same-sex sexual discrimination.

By contrast, most courts have held that heterosexual employees who are harassed by gay co-workers have a cause of action under Title VII. See *E.E.O.C. v. Walden Book Co., Inc.*, 885 F.Supp. 1100 (M.D. Tenn. 1995); *Ecklund v. Fuisz Technology, Ltd.*, 905 F. Supp. 335 (E.D. Va. 1995); *Prescott v. Independent Life and Accident Insurance Co.*, 878 F. Supp. 1545 (M.D. Ala. 1995); *Swage v. Philadelphia and Creative Remodeling, Inc.*, 1996 WL 368316 (E.D. Pa. 1996); *Pritchett v. Sizeler Real Estate Management Company, Inc.*, 1995 WL 241855 (E.D. La. 1995). Cite: *Quick v. Donaldson Co., Inc.*, 895 F.Supp. 1288 (S.D. Iowa 1995).

b. *Mayo v. Kiwest Corporation (1995)*. Jerry G. Mayo, plaintiff, was employed by defendant, Kiwest, of Virginia Contracting and Construction Management Corporation. Defendant, a Virginia corporation, was involved in general contracting, construction and real estate management, remodeling and maintenance. Plaintiff alleged that his male supervisor made sexually explicit and vulgar comments to him, grabbed him in a sexual manner, and told others that Plaintiff was gay. Soon after filing a formal complaint letter with management, he was informed that his complaints were "without merit", and that he was being terminated for "wrongdoing on the job."

Mayo's action alleged claims for sex discrimination and harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, for retaliation in violation of Title VII, wrongful discharge, intentional infliction of emotional distress, and assault and battery.

Reaffirming the paradigm that when a male supervisor harasses a male subordinate, the conduct does not fall within Title VII protection, the court found no cause of action for same-sex discrimination under the statute. In addition, the court also reaffirmed that Title VII only provides relief to certain kinds of harassment and did not afford plaintiff a remedy to the discriminatory conduct in his complaint. *Mayo v. Kiwest Corp.*, 898 F. Supp. 335 (E.D. Va. 1995).

c. *Dillon v. Frank (1992)*. Ernest Dillon worked for the U.S. Postal Service in Michigan. Dillon was subjected to a three year campaign of harassment by his coworkers because they perceived him to be gay, including verbal threats and physical assault. Because his superiors were not able to stem the abusive treatment, Dillon quit his job and filed a sexual harassment claim under Title VII. Dillon also file a state law claim of intentional infliction of emotional distress. The district court dismissed both claims on procedural grounds. It also noted as an independent, substantive basis for its decision that a cause of action could not be stated under Title VII for discrimination based on sexual orientation. The U.S. Court of Appeals for the Sixth Circuit affirmed the decision on all grounds. Addressing the substantive aspect of the Title VII claim, the court held that Dillon had been harassed because he was gay, not because he was a man, and that Title VII provided no protection against discrimination based on sexual orientation. Cite: *Dillon v. Frank*, No. 90-2290, 1992 U.S. App. LEXIS 766 (6th Cir. Jan. 15, 1992).

d. *Carreno v. Local Union 226 International Brotherhood of Electronic Workers (1990)*. J. Carreno was a journeyman electrician and member of Local Union 226 of the International Brotherhood of Electronic Workers (IBEW). In 1987, he quit a job on a construction site and filed a grievance with Local 226, alleging he had been subjected to verbal and physical harassment because of his sexual orientation. After Local 226 failed to consider his charges of harassment, he filed a sexual harassment claim against Local 226 with the Kansas Commission on Civil Rights. The Commission issued a finding that Carreno's complaints lacked probable cause.

Carreno filed suit in the U.S. District Court for Kansas, alleging he was the victim of sexual orientation-based harassment in violation of Title VII and the Kansas Act Against Discrimination (KAAD). The court adopted the reasoning of *DeSantis v. Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327 (9th Cir. 1979) (Title VII prohibits harassment based on sex, not sexual orientation), and rejected Carreno's Title VII claim, finding he was harassed because he was a gay male, not because he was a male. It then applied the same reasoning to his KAAD claim, holding that Act to be directly analogous to Title VII. Cite: *Carreno v. Local Union No. 226, IBEW*, No. 89-4083-5, 1990 U.S. Dist. LEXIS 13817 (D. Kan. 1990).

e. *Williamson v. A.G. Edwards & Sons (1989)*. Darrell Williamson, an African American, was discharged from his position with A.G. Edwards after eight years of service. A.G. Edwards & Sons alleged he was fired for disruptive and inappropriate conduct; Williamson alleged he was discharged for being honest about his sex orientation at work and that similarly situated white employees were not dismissed. Williamson challenged his dismissal in federal court, claiming he was discriminated against based on his race in violation of Title VII and 42 U.S.C. § 1981.

The district court granted summary judgment to A.G. Edwards, holding that Williamson's evidence indicated he had been discriminated against because he was gay, not because he was African American, and that neither Title VII nor § 1981 prohibited discrimination based on sexual orientation. The U.S. Court of Appeals for the Eighth Circuit affirmed, holding that Williamson had failed to allege sufficient facts to support his contention that similarly situated white gay men were treated differently. Cite: *Williamson v. A.G. Edwards & Son*, 876 F.2d 69 (8th Cir. 1989), cert. denied, 493 U.S. 1089 (1990).

f. *Joyner v. AAA Cooper Transportation (1984)*. Timothy Joyner, presumably a heterosexual man, worked as a mechanic for AAA Cooper Transportation (AAA). He complained to the company's chairman after a management level male employee allegedly made a sexual advance toward him. Joyner was eventually promoted to a position as a driver and was transferred, over his objections, to a division in which the other employee was his direct supervisor. Joyner lost all seniority with the transfer and was eventually laid off during an economic slowdown. AAA eventually hired new drivers and rehired all other drivers laid off when Joyner was laid off but claimed that business was too slow to rehire him.

Joyner filed a charge of sex discrimination against AAA with the Equal Employment Opportunity Commission (EEOC). The EEOC held there was no probable cause to believe Joyner's charges were valid. Joyner then sued AAA in the U.S. District Court for the Middle District of Alabama, claiming AAA's actions violated Title VII. The court held Joyner's supervisor would not have sexually harassed him if he were not male, therefore he had discriminated against him based on his gender, in violation of Title VII. Cite: *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537 (M.D. Ala. 1983), *aff'd*, 749 F.2d 732 (11th Cir. 1984).

g. *Wright v. Methodist Youth Services (1981)*. Donald Wright was terminated after working for three years for Methodist Youth Services (MYS), a private, nonprofit corporation providing social services for minors in the State of Illinois. Wright alleged his termination was the result of his refusal of his male boss's sexual advances towards him. Wright sued in the U.S. District Court for the Northern District of Illinois, claiming his discharge violated Title VII and 42 U.S. C. §§ 1983 & 1985.

The court refused to grant a motion to dismiss Wright's Title VII claim. It reasoned that Wright sufficiently stated a gender-based discrimination claim since the specific discrimination he alleged would not have been directed at him if he were a female.

The court dismissed Wright's claim that his Fourteenth Amendment rights under the federal constitution were infringed in violation of § 1983, holding that MYS's links with the state were not sufficient to qualify its actions as having been taken under the color of state law. It also dismissed the § 1985 claim, holding that the substance of the alleged discrimination was based on the Fourteenth Amendment, which also requires state action. Cite: *Wright v. Methodist Youth Serv.*, 511 F. Supp. 307 (N.D. Ill. 1981).

h. *DeSantis v. Pacific Telephone and Telegraph (1979)*. DeSantis consolidated four cases involving claims of employment discrimination by gay and lesbian employees who had been dismissed from private companies when their supervisors learned of their sexual orientation. All challenged the legality of their dismissals in federal district court, arguing the dismissals violated Title VII and 42 U.S.C. § 1985.

The district courts dismissed all claims in each case, primarily for failure to state a claim upon which relief could be granted. The U.S. Court of Appeals for the Ninth Circuit affirmed. It rejected the Title VII claims, holding Title VII's protections extended only to the classes of people enumerated within the law and that since sexual orientation was not expressly mentioned, Title VII did not prohibit such discrimination. The court also rejected the § 1985 claim, holding that gay people did not constitute a federally protected class for purposes of § 1985. Cite: *DeSantis v. Pacific Tel. and Tel. Co.*, 608 F.2d 327 (9th Cir. 1979).

4. PRISONER CASES.

a. *Kelley v. Vaughn (1991)*. Title VII claim rejected. Summarized in prisoner cases section.

B. CASES BROUGHT UNDER 42 U.S.C. § 1983.

Originally enacted as the Civil Rights Act of 1871, 42 U.S.C. § 1983 allows an action to be brought whenever an individual is deprived under the color of state law of "any rights, privileges or immunities secured by the Constitution and laws." Because its prohibition against the deprivation of an individual's civil rights is broad, compared to other civil rights provisions, § 1983 is frequently relied upon in employment discrimination cases based on sexual orientation. Its scope is circumscribed, however, by the fact that a valid § 1983 claim requires a violation of a constitutional or statutory right action taken under the color of state law.

1. GOVERNMENT EMPLOYMENT CASES (FEDERAL).

Of 68 cases analyzed, none has raised a § 1983 claim. Thirty-nine additional cases have not yet been reviewed.

2. GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).

a. *Equality Foundation of Greater Cincinnati v. City of Cincinnati (1995)*. Summarized in equal protection cases section.

b. *Jantz v. Muci (1992)*. Section 1983 claim rejected. Summarized in equal protection cases section.

c. *Walls v. City of Petersburg (1990)*. Section 1983 claim rejected. Summarized in right of privacy section.

d. *Endsley v. Naes (1987)*. Section 1983 claim based on freedom of association rejected. Summarized in freedom of association section.

e. *Rowland v. Mad River Local School District (1983)*. Section 1983 claim rejected. Summarized in equal protection section.

f. *Burton v. Cascade School District (1975)*. Section 1983 claim upheld. Summarized in federal constitutional violations section.

g. *Acanfora v. Board of Education (1974)*. Section 1983 claim upheld. Summarized in freedom of expression cases section.

3. PRIVATE EMPLOYMENT CASES.

a. *Wolotsky v. Huhn (1992)*. Section 1983 claim rejected. Summarized in equal protection cases section.

b. *Moshi v. Bally Corporation (1990)*. Section 1983 claim dismissed. Summarized in equal protection cases section.

c. *Wright v. Methodist Youth Services (1981)*. Section 1983 claim rejected. Discussed in Title VII section.

4. PRISONER CASES.

a. *Johnson v. Knable (1991)*. Prisoner held to have potentially cognizable § 1983 claim. Summarized in prisoner cases section.

b. *Givens v. Shuler (1987)*. Prisoner's § 1983 claim rejected based on lack of standing. Summarized in prisoner cases section.

C. CASES BROUGHT UNDER OTHER FEDERAL STATUTES.

In addition to cases brought under 42 U.S.C. § 1983 and Title VII, other statutory challenges have been brought under 42 U.S.C. §§ 1981 & 1985(3). Neither of these statutory provisions require a state action. Section 1981 was originally passed to provide slaves with the same legal rights as "white citizens" and provides generally that "all persons" within the U.S. are entitled to the "full and equal benefits of all laws." Despite this broad language, § 1981 has been judicially construed as prohibiting only discrimination based on race or ethnicity. Section 1985(3) was originally passed in 1861 for similar purposes as § 1981. It prohibits two or more individuals from conspiring to deprive "any person or class of persons of the equal protection of the laws." Section 1985(3), unlike § 1981, protects against invidious discrimination based on classifications of persons by non-racial characteristics, as well as race.

Employment discrimination based on sexual orientation also has been challenged as a violation of the Administrative Procedure Act (APA), which requires that federal employment related decisions not be arbitrary, capricious or unconstitutional. This cause of action has been most frequently cited in Civil Service Commission and security clearance related cases, which are consolidated in separate sections, below. (See Sections VI and VII.)

1. GOVERNMENT EMPLOYMENT CASES (FEDERAL).

a. *Doe v. Gates (1992)*. Claims under APA and Central Intelligence Agency regulations rejected. Summarized in security clearance related cases section.

b. *United States Information Agency v. Krc (1992)*. APA claim rejected. Summarized in security clearance related cases section.

c. *Doe v. Cheney (1989)*. Claims under National Security Agency (NSA) regulations and 5 U.S.C. § 7532 (requires that NSA employees dismissed for security reasons be given an impartial hearing) rejected. Summarized in security clearance related cases section.

d. *Dew v. Halaby (1962)*. APA claim rejected. Summarized in Civil Service Commission related cases.

2. GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).

Of 68 cases analyzed, none has raised a § 1981 or § 1985 claim. Thirty-nine additional cases have not yet been reviewed.

3. PRIVATE EMPLOYMENT CASES.

a. *Wolotsky v. Huhn (1992)*. Section 1985 claim rejected. Summarized in equal protection cases section.

b. *Moshi v. Bally Corporation (1990)*. Section 1981 claim rejected. Summarized in equal protection cases section.

c. *Dubbs v. Central Intelligence Agency (1989)*. APA claim rejected. Summarized in security clearance related cases section.

d. *Williamson v. A.G. Edwards & Sons (1989)*. Section 1981 claim rejected. Summarized in Title VII section.

e. *Wright v. Methodist Youth Services (1981)*. Section 1985 claim rejected. Discussed in Title VII section.

f. *DeSantis v. Pacific Telephone and Telegraph (1979)*. Section 1985 claim rejected. Discussed in Title VII section.

IV. CASES BROUGHT UNDER STATE/MUNICIPAL STATUTES.

A. GOVERNMENT EMPLOYMENT CASES (STATE/MUNICIPAL).

Of 68 cases analyzed, none has raised a state or municipal law-based claim. Thirty-nine additional cases have not yet been reviewed.

B. PRIVATE EMPLOYMENT CASES.

1. *Gay and Lesbian Law Students Ass'n at the Univ. of Conn. Sch. of Law v. Board of Trustees (1996)*. A gay student group brought an action against the Connecticut School of Law seeking an injunction to prohibit the law school from permitting the military from using the school's employment recruiting facilities. The student group sought the injunction because the military discriminated against gay men and lesbians.

The Superior Court granted the student group a permanent injunction after finding that the defendants had violated Connecticut's Gay Rights Law, which, inter alia, forbids discrimination in employment on the basis of sexual preference. The Supreme Court of Conn. affirmed. Cite: *Gay and Lesbian Law Students Ass'n at the Univ. of Connecticut Sch. of Law v. Board of Trustees*, 673 A.2d 484 (Conn. 1996).

2. *Greenwood v. Taft, Stettinius & Hollister (1995)*. Reliance on municipal anti-sexual orientation discrimination ordinance unsuccessful. Summarized in state contract, tort or other causes of actions section, below.

3. *Presbyterian Church v. Florio (1995)*. The Reverend David Cummings admitted to refusing to employ gay people in violation of a New Jersey statute protecting gay people and bisexuals from discrimination. Accordingly, Cummings sought a declaratory judgment that the statute violated the First Amendment because it imposed severe disabilities upon the religious viewpoint that homosexuality and bisexuality are sinful and immoral.

The U.S. District Court for New Jersey held that because the statute would not create an unacceptable risk of the suppression of ideas and encompassed conduct that the State could legitimately prohibit, it was not unconstitutionally vague or overbroad. Moreover, the Court held that because the statute was not directed primarily toward regulating speech, it did not constitute impermissible content or viewpoint-based discrimination. Cite: *Presbyterian of New Jersey of the Orthodox Presbyterian Church v. Florio*, 902 F. Supp. 492 (D.N.J. 1995).

4. *Curran v. Mt. Diablo Council of the Boy Scouts of Am. (1994)*. Timothy Curran was a member of a boy scout troop within the jurisdiction of the Mt. Diablo Council of the Boy Scouts of America for four years (1975 to 1979). He attained the rank of Eagle Scout, the highest rank a boy scout can reach. He was selected to participate in Mt. Diablo Council's troop leadership development program. He was also one of some 35 boy scouts selected by the Mt. Diablo Council out of some 13,500 scouts to attend the Boy Scouts of America National Jamboree. In the fall of 1980, Curran applied to be an assistant scoutmaster with the Mt. Diablo Council. The preceding spring, Curran took a male date to the senior prom and announced to the press that he was proud of being gay. Citing the parties' conflicting moral viewpoints because Curran was gay, the Mt. Diablo Council told Curran that it would not approve him as an adult leader of boy scouts. Curran filed a

lawsuit based upon the Unruh Act, Civil Code section 51, which prohibits discrimination by business establishments.

The Los Angeles County Superior Court sustained Mt. Diablo Council's general demurrer without leave to amend and dismissed Curran's action. The Court of Appeal reversed, holding that Curran's amended complaint stated a cause of action for violation of the Unruh Act. At trial, the Superior Court ruled in favor of the Mt. Diablo Council, despite a finding that the plaintiff's homosexuality was the only reason for defendant's refusal to admit him as an adult member. The Court of Appeals affirmed the Superior Court ruling, holding that forcing the Mt. Diablo Council to accept a gay person as troop leader would violate the First Amendment and that the Mt. Diablo Council is not a business establishment within the meaning of the Unruh Civil Rights Act. Cite: *Curran v. Mt. Diablo Council of the Boy Scouts of Am.*, 43 Cal.App.4th 1370 (Cal.Ct.App. 1994).

5. ***Rendon v. United Airlines (1994)***. Richard Rendon was a gay man who worked for United Airlines. On one occasion, co-workers referred to his homosexuality in an offensive manner, culminating in Rendon's assault in the employer's parking lot. On a separate occasion a co-worker, in Rendon's presence, made a derogatory reference to gay people. As a result of these incidents Rendon suffered post-traumatic stress disorder and was unable to work for a period of time.

The Industrial Claim Appeals Panel awarded Rendon temporary total disability benefits for these two mental stress claims. The Colorado Court of Appeals upheld the Panel's decision, noting that although the subject of the dispute was unrelated to the employment, the injuries had an inherent connection with the employment and were thus compensable. Cite: *Rendon v. United Airlines*, 881 P.2d 482 (Colo. App. 1994).

6. ***Howard Univ. v. Green (1994)***. LuEthe Green was terminated from her position as Associate Director of Nursing at Howard University after she complained that her supervisor had engaged in favoritism. Green believed that her supervisor favored lesbians, but she did not lodge a specific complaint of sexual orientation discrimination. After her discharge, Green brought suit alleging retaliatory discharge in violation of the District of Columbia Human Rights Act (DCHRA), which forbids discrimination on the basis of sexual orientation.

The Superior Court entered a judgment for Green after finding that Green's complaints of favoritism were protected activity under the DCHRA, since in the context, her employer could have inferred that Green was protesting sexual orientation discrimination. The District of Columbia Court of Appeals reversed, finding that Green had failed to adequately alert her employer that she was speaking out against unlawful discriminatory activity and that she therefore was not protected by the DCHRA. Cite: *Howard Univ. v. Green*, 652 A.2d 41 (D.C. 1994).

7. ***Hanke v. Safari Hair Adventure (1994).*** Raymond Hanke quit his job as a hair stylist at Safari Hair Adventure after his supervisor indicated he would do nothing to stop a managerial level employee from subjecting Hanke to homophobic remarks. His subsequent application for unemployment compensation was turned down by the Minnesota Commission on Jobs and Training (MCJT) on the grounds he did not demonstrate good cause for quitting. Hanke challenged the commission's decision in the Minnesota Court of Appeals. The court held that harassment based on sexual orientation provided sufficient cause for quitting one's job under Minnesota law (specific statute/regulation not specified) and ordered that Hanke not be disqualified from receiving unemployment compensation. Cite: Hanke v. Safari Hair Adventure, 512 N.W.2d 614 (Minn. Ct. App. 1994).

8. ***Smedley v. Capps, Staples, Ward, Hastings and Dodson (1993).*** Lauren Smedley worked as an associate with the law firm of Capps *et al.* After Smedley was hired, the firm learned she was a lesbian. Her supervisor told her the firm did not like employees to bring political or controversial issues into the office and that therefore she should not discuss her sexual orientation with clients or at firm social events. Smedley was discharged from her position shortly after she was quoted in a local news article that identified her firm and the fact that she was a lesbian.

Smedley challenged the firm's policy and her dismissal as illegal under § 1101 of the California Labor Code, which prohibits employers from preventing employees from engaging in politics. The U.S. District Court for the Northern District of California denied cross-motions for summary judgment, holding that genuine disputes of material facts existed as to why Smedley was fired and whether or not the firm's alleged policy violated § 1101. Cite: Smedley v. Capps, Staples, Ward, Hastings, & Dodson, 820 F. Supp. 1227 (N.D. Cal. 1993).

9. ***Mogilefsky v. Superior Court of Los Angeles County (1993).*** Wayne Mogilefsky worked as a creative editor for Silver Pictures, a subsidiary of Warner Bros. Mogilefsky alleged his employer, Joel Silver, propositioned him on several occasions and that he was told by fellow employees that previous employees had been fired for not acceding to Silver's overtures. Mogilefsky sued Silver, Silver Pictures and Warner Bros., claiming that he was sexually harassed and discriminated against in violation of California's Fair Employment and Housing Act (FEHA). The Superior Court of Los Angeles County dismissed the sexual harassment claim, holding Mogilefsky had not stated a cognizable claim. The Court of Appeals for California vacated the Superior Court's order and directed it to consider Mogilefsky's sexual harassment claim. It held Mogilefsky had stated a cognizable claim of quid pro quo (sex demanded as a condition of employment) and hostile environment sexual harassment under the FEHA, even though the FEHA did not explicitly address same-sex sexual harassment. Cite: Mogilefsky v. Superior Court, 20 Cal. App. 4th (1993).

10. ***Delaney v. Superior Fast Freight (1993).*** Jim Delaney was fired from his position with Superior Fast Freight (SFF), allegedly for threatening his supervisor and two

coworkers. He subsequently sued on multiple counts in federal and state court, including a state court claim that he was discriminated against based on his sexual orientation in violation of California state law. His original complaint failed to allege a violation under the provision of California's Labor Code that prohibits employment discrimination based on sexual orientation, and the trial court denied his request to amend his complaint. The court then granted summary judgment to SFF on the grounds that the Los Angeles municipal ordinance cited in his complaint in support of his discrimination claim had been preempted by California's Fair Employment and Housing Act, which it construed as not banning employment discrimination based on sexual orientation. The California Court of Appeal reversed the trial court's decision and remanded the case for further proceedings, holding the lower court had erred in not allowing Delaney to amend his complaint to include the count based on the Labor Code. Cite: *Delaney v. Superior Fast Freight*, 14 Cal App. 4th 590 (1993).

11. *Wortman v. Philadelphia Commission on Human Relations (1991)*. James Wortman filed a complaint with the Philadelphia Commission on Human Relations (PCHR), alleging he had been fired from his job because of his sexual orientation in violation of Philadelphia municipal law. The Commission investigated Wortman's complaint and informed him by letter it had been dismissed as unsubstantiated. Wortman appealed PCHR's decision to the Court of Common Pleas of Philadelphia County, which held his appeal was precluded by a regulation that prohibited appeals of a PCHR determination that a complaint is unsubstantiated. The Commonwealth Court of Pennsylvania remanded the case, holding Philadelphia municipal law permitted appeals of PCHR dismissals of claims. Cite: *Wortman v. Commission on Human Relations*, 591 A.2d 331 (Pa. Commw. 1991).

12. *Carreno v. Local Union 226 International Brotherhood of Electronic Workers (1990)*. Claim brought under the Kansas Act Against Discrimination rejected. Summarized in Title VII section.

13. *Gay Law Students Association v. Pacific Telephone and Telegraph Co. (1979)*. Gay Law Students, joined by four individuals and another pro-gay rights organization, brought this class action under California law seeking to enjoin Pacific Telephone and Telegraph (PT&T) from discriminating against gay men and lesbians in its employment practices. The suit also sought an injunction requiring the California Fair Employment Practice Commission (FEPC) to act upon complaints of employment discrimination based on sexual orientation brought under the California Fair Employment Practice Act (FEPA).

The trial court ruled against Gay Law Students on both counts, holding that neither the FEPA nor the California Constitution could be construed as prohibiting sexual orientation discrimination in employment. The California Supreme Court affirmed the ruling as it applied to the FEPC, holding that since the FEPA did not include sexual orientation among its enumerated categories of individuals protected against employment discrimination, it could not be construed as prohibiting employment discrimination based on sexual orientation. It

reversed the lower court's ruling as it applied to PT&T, however, holding the equal protection clause of the California Constitution, the California Public Utilities Code and the California Labor Code all prohibited arbitrary employment discrimination by a public utility. Cite: *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.*, 595 P.2d 592 (Cal. 1979).

14. *Gaylord v. Tacoma School District No. 10 (1977)*. James Gaylord was a teacher in Tacoma, Washington for 12 years. During that time he consistently received favorable evaluations of his work. When a school official eventually questioned him regarding his sexual orientation, Gaylord freely admitted he was gay. Within a month he was fired from his teaching position on the basis of the school district's policy of providing for the discharge of employees for "immoral" conduct. Washington's Supreme Court upheld the discharge, holding the school district was justified in finding that homosexuality was immoral and that public knowledge of Gaylord's status impaired his efficiency as a teacher. Cite: *Gaylord v. Tacoma Sch. Dist. No. 10*, 559 P.2d 1340 (Wash.), cert. denied, 434 U.S. 879 (1977).

V. CASES BROUGHT UNDER STATE CONTRACT, TORT OR OTHER CAUSES OF ACTION.

A. GOVERNMENT EMPLOYMENT CASES.

1. *United States Information Agency v. Krc (1992)*. Claim of wrongful interference with employment rejected. Summarized in security clearance related cases section.

B. PRIVATE EMPLOYMENT CASES.

1. *Leibert v. Transworld Sys., Inc. (1995)*. Chad Leibert, a collection specialist, brought a civil action in California state court against Transworld Systems Incorporated alleging that Transworld harassed and fired him because of his sexual orientation.

The trial court dismissed all four of Leibert's causes of action. The appellate court affirmed the dismissal of Leibert's Labor Code violation because Leibert had failed to exhaust his administrative remedies. The court affirmed the dismissal of Leibert's violation of privacy claim because Leibert had admitted that his status as a gay person was non-confidential. The appellate court re-instated Leibert's claims of intentional infliction of emotional distress and wrongful discharge in violation of public policy. As support for these two claims, the court cited the state's Labor Code, which evidences a state-wide public policy against sexual orientation discrimination. Cite: *Leibert v. Transworld Sys., Inc.*, 32 Cal. App. 4th 1693 (Cal. Ct. App. 1995).

2. *Greenwood v. Taft, Stettinius & Hollister (1995)*. Scott Greenwood was an attorney who was fired by the law firm of Taft, Stettinius & Hollister. Plaintiff claimed his termination was due to his status as a gay man and because he had performed pro bono work in favor of retaining a municipal human rights ordinance which prohibited discrimination in the city of Cincinnati on the basis of sexual orientation. Greenwood challenged his discharge in state court, claiming first that it constituted the tort of invasion of privacy and second that it violated public policy. The Court of Common Pleas granted the law firm's motion to dismiss both claims for relief.

The Court of Appeals of Ohio reversed the lower court's dismissal of the tort claim, ordering further proceedings on whether the law firm had tortiously invaded Greenwood's privacy by spreading information about his sexual orientation. With respect to the dismissal of Greenwood's public policy claim, the Court of Appeals of Ohio affirmed. It held that the type of public policy that warrants an exception to the employment-at-will doctrine must be of uniform, statewide application. The court reasoned that since Greenwood relied upon a single municipal ordinance, he had failed to show the existence of a statewide public policy against sexual orientation discrimination. Therefore, his public policy cause of action was properly dismissed. Cite: *Greenwood v. Taft, Stettinius & Hollister*, 663 N.E.2d 1030 (Ohio Ct. App. 1995).

3. *Hicks v. Arthur (1994)*. Schree Hicks challenged the termination of her employment with Resources for Human Development, Inc. on multiple grounds, including that she was wrongfully discharged based on her sexual orientation. The U.S. District Court for the Eastern District of Pennsylvania dismissed the sexual orientation related claim, holding that Hicks was an employee-at-will and had failed to demonstrate a clearly mandated public policy rationale supporting a sexual orientation exception to the employment-at-will doctrine. Cite: *Hicks v. Arthur*, 843 F. Supp. 949 (E.D. PA 1994).

4. *Joffe v. Vaughn (1993)*. Clayton Vaughn worked for KOTV in Oklahoma, first as a television reporter, then as evening news co-anchor. He was fired from his position after KOTV conducted a cursory investigation into an allegation made by his co-anchor's male hair dresser that the hair dresser and Vaughn had a sexual encounter. Vaughn sued KOTV, several of its officials and the hair dresser in state court, alleging wrongful discharge, slander, tortious interference with his contract and intentional infliction of emotional distress. Vaughn subsequently committed suicide. Vaughn's wife, representing his estate, pursued the claim. Only the intentional infliction of emotional distress claim survived Vaughn's death. The jury found for Vaughn's estate, awarding a total of \$4,000,000 in actual and punitive damages. The Court of Appeals of Oklahoma upheld both the verdict and the damages awarded. Cite: *Joffe v. Vaughn*, No. 79,505, 1993 Okla. Civ. App. LEXIS 192; 62 O.B.A.J. 1651 (Okla. Ct. App. Oct. 26, 1993).

5. *Dillon v. Frank (1992)*. Intentional infliction of emotional distress claim dismissed on procedural grounds. Summarized in Title VII section.

6. *Collins v. Shell Oil Company (1991)*. Jeffery Collins was a top level management employee for Shell Oil Company. Through various company statements, personnel policies and practices, Shell repeatedly assured its employees that they would be dismissed only for good cause. Under California law these assurances were binding as an implied contract. When Collins' secretary provided his supervisor with a personal document inadvertently left by Collins in his office that indicated he was gay, the supervisor and other Shell management personnel decided to terminate him. Because they lacked good cause, Collins' supervisors fabricated an *ad hoc* negative evaluation which, without warning, they placed in his personnel record. They then dismissed him for allegedly failing to adequately perform his duties, despite 19 years of positive work evaluations. Collins sued Shell on his contract and for intentional infliction of emotional distress. The Appellate Department, Superior Court for Alameda County, California found Collins' supervisors fired him solely because of his sexual orientation, and awarded him a combined total of \$5,323,299 on his contract and tort claims. Shell appealed the decision, but eventually settled out of court. *Collins v. Shell Oil Co.*, 60 U.S.L.W. 2092 (Cal. App. Dept. Super Ct., June 13, 1991).

VI. CIVIL SERVICE COMMISSION CASES.

Until the mid-1970s the Civil Service Commission permitted the discharge of gay and lesbian civil service employees because their conduct was deemed to violate Civil Service Regulations that made "immoral" conduct grounds for dismissal. Subsequent to the Singer case summarized below, those regulations were changed and "immoral" conduct was excised from the list of actions that provide grounds for dismissal. Although Chapter 731 of the Federal Personnel Manual still provides that a person may be dismissed for "criminal . . . infamous or notoriously disgraceful conduct" these terms are no longer construed as allowing dismissal for private gay conduct. As a result, the line of cases involving dismissals from civil service positions because of sexual orientation ends in the mid-1970s.

1. *Singer v. United States Civil Service Commission (1976)*. John Singer was hired as a clerk in the Seattle office of the EEOC. Although no complaint was made regarding his conduct at work or the performance of his job, his openness about his sexual orientation and his participation in various gay community and media activities resulted in his dismissal. Singer challenged his dismissal first within the Civil Service Commission, then in federal court, claiming it violated his federal constitutional rights of freedom of expression and due process of law. The district court granted summary judgment to the Commission.

The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's order, holding that the government's desire to promote the efficiency and protect the public image of the EEOC and the Civil Service provided a rational basis for the Commission's actions. *Singer v. United States Civ. Serv. Commn.* 530 F.2d 247 (9th Cir. 1976) vacated, 429 U.S. 1034 (1977) (vacated at request of Solicitor General after the Civil Service Commission changed its regulation to no longer allow discrimination based solely on sexual orientation).

2. ***Society for Individual Rights v. Hampton (1975).*** Donald Hickerson was discharged from his clerical position with the Department of Agriculture when it discovered that he had previously been discharged from the Army because he was gay. The Society for Individual Rights and Hickerson challenged the Civil Service Commission's policy of excluding all individuals who had engaged or solicited others to engage in homosexual conduct, both on the behalf of Hickerson and as a class action.

The U.S. District Court for the Northern District of California granted summary judgment to the Society and Hickerson and enjoined the Civil Service Commission from enforcing a blanket policy of excluding gay people. In doing so, it held that the Commission's policy was arbitrary, capricious and lacking a rational basis as required by the federal constitutional guarantee of due process of law. It rejected the Commission's argument that the blanket policy was rationally related to a legitimate government interest in protecting the efficiency of the service from being brought into public disrepute by being associated with homosexual conduct. The court left open the possibility of applying this rationale in individual cases if an actual impairment could be demonstrated. The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's decision not to grant retroactive relief on the class action, but expressed no opinion on the district court's core holding. Cite: *Society for Individual Rights, Inc. v. Hampton*, 528 F.2d 905 (9th Cir. 1975).

3. ***Baker v. Hampton (1973).*** Charles Baker was discharged from his federal civil service clerical position with the National Bureau of Standards for refusing to answer questions regarding his sexual orientation. Baker and another individual who was not rehired to a similar position for the same reason challenged their dismissals in the U.S. District Court for D.C. The court found that the Civil Service Commission had failed to establish a rational relationship between the questions and the ability of Baker and Rau to perform their duties and ordered the plaintiffs reinstated to their positions with back pay. Cite: *Baker v. Hampton*, 6 Empl. Prac. Dec. P9043 (D. D.C. 1973).

4. ***Dew v. Halaby (1962).*** William Dew worked as an air traffic controller for the Civil Aeronautics Authority (CAA). When the CAA learned that a previous employer had dismissed Dew because he had admitted teenage homosexual conduct and experimentation with marihuana, it dismissed Dew pursuant to Civil Service Commission regulations allowing an individual to be discharged for "criminal, infamous, dishonest, immoral or notoriously disgraceful conduct" where such a dismissal would promote the efficiency of the service. Dew challenged his dismissal, primarily on the grounds that his dismissal for pre-employment conduct was arbitrary and capricious and thus violated the APA. The U.S. District Court for D.C. upheld the Commission's dismissal of Dew. The U.S. Court of Appeals for the D.C. Circuit affirmed the decision, finding that dismissal for pre-employment conduct could not be said to be either arbitrary or capricious and thus the Commission was justified in finding that retaining Dew would adversely affect the efficiency of the service. Cite: *Dew v. Halaby*, 317 F.2d 582 (D.C. Cir. 1962), cert. dismissed, 379 U.S. 951 (1964).

VII. CASES INVOLVING REVOCATION OR DENIAL OF A GOVERNMENT SECURITY CLEARANCE.

A. GOVERNMENT EMPLOYMENT CASES.

1. *Buttino v. Federal Bureau of Investigation (1992)*. Frank Buttino was released from his position as a special agent for the FBI after he admitted he was gay during a security investigation. The Bureau claimed Buttino was deceptive and uncooperative in his investigation and thus was a security risk -- despite 20 years of service in sensitive positions. Buttino challenged his dismissal in federal court, alleging that the FBI's justification was merely a pretext for discriminating against him because of his sexual orientation in violation of his federal constitutional rights of freedom of expression and association, due process and equal protection of law.

The U.S. District Court for the Northern District of California granted summary judgment to the FBI on the due process claim because Ninth Circuit precedent, *Dorfinont v. Brown*, 913 F.2d 1399 (9th Cir. 1990), cert. denied, 111 S.Ct. 1104 (1991), precluded due process challenges of security clearance revocations. It also granted summary judgment against Buttino on the freedom of expression and association claims because he failed to litigate them. Summary judgment on the equal protection claim was denied on the grounds that triable issues of fact remained as to whether Buttino's sexual orientation was the basis for his discharge and, if it was, whether there was a rational basis for FBI employment discrimination against gay people holding sensitive positions. The case eventually settled out of court and the FBI issued new internal guidelines prohibiting the asking of questions regarding sexual orientation during security clearances. *Buttino v. FBI*, 801 F. Supp. 298 (N.D. Cal. 1992).

2. *Doe v. Gates (1992)*. John Doe worked for the Central Intelligence Agency (CIA) for nine years, first as a clerk-typist, then as an electronics technician. During this time he was consistently rated as an excellent or outstanding employee. When he voluntarily informed a security officer that he was gay, the CIA placed him on administrative leave and began a security investigation. He voluntarily submitted to a polygraph examination and was told by the polygrapher that the test indicated he had not engaged in sexual relations with foreign nationals or divulged classified information to a sexual partner. Despite this result, Doe eventually was told that his sexual orientation made him a security risk and he was discharged from his position by direction of the Director of the CIA acting under the authority granted him by the National Security Act of 1947 to terminate an employee whenever he deemed it necessary or in the interests of the United States.

Doe challenged his dismissal in the U.S. District Court for D.C., charging that it violated CIA regulations, the APA and his federal constitutional rights to privacy, due process and equal protection of law. The district court ordered Doe reinstated to administrative leave status, holding that dismissing Doe without explaining why his sexual

orientation posed a security threat violated procedural guarantees contained in both CIA regulations and the APA (*Doe v. Casey I*, (1985)).

The U.S. Court of Appeals for the D.C. Circuit reversed the district court's order and ordered the case remanded for further proceedings. It held that although no CIA regulation prohibited the Director from discharging Doe without providing a reason, the lack of a stated reason or a finding by the district court regarding the Director's reason precluded the appellate court from determining if the Director acted arbitrarily and capriciously in violation of the APA (*Doe v. Casey II*, (1986)).

The Supreme Court declined to affirm the appellate court's holding, reasoning that the National Security Act committed the discharge of CIA employees for security reasons to the Director alone, immune from judicial review except for legitimate constitutional claims. It then remanded the case for consideration of Doe's allegations that his federal constitutional rights were violated (*Webster v. Doe*, (1988)).

On remand, the district court rejected Doe's equal protection argument, reasoning that since gay people were subject to coercion and were frequently targeted by foreign intelligence services, the CIA's actions were justified by its need to protect legitimate government security interests. It found for Doe on his due process claim, however, finding that a failure to list homosexuality as a dischargeable offense in its regulations or its employee handbook provided Doe with a legitimate property interest in his job that could not be terminated without a hearing. The right to privacy claim was not adjudicated due to Doe's failure to litigate (*Doe v. Webster*, (1991)).

The circuit court once again reversed the district court, reasoning that there was no cognizable due process violation because Section 102(c) of the National Security Act precluded the creation of a legitimate property interest in employment in Doe by CIA regulations or employee procedures. It also found that Doe had failed to adequately demonstrate that the CIA had a blanket policy of discharging gay people and therefore no viable constitutional equal protection claim existed. Cite: *Doe v. Gates*, 981 F.2d 1316 (D.C. Cir. 1992), cert. denied, 114 S. Ct. 337 (1993).

3. *United States Information Agency v. Krc (1992)*. Jan Krc had a limited Foreign Service appointment with the United States Information Agency (USIA) and was assigned to work in Yugoslavia. During his post-tour security debriefing it was established that he had engaged in homosexual conduct with a military attache from a non-NATO European country and with two nationals from a communist country. The USIA terminated Krc's foreign service appointment when its Director of Security disapproved him for further foreign assignments on the grounds that Krc's lack of judgment made him a security risk. Krc challenged the USIA's action with the Foreign Service Grievance Board, which ordered him reinstated. The USIA then brought this action in federal court, seeking to set aside the board's order. Krc counterclaimed, challenging the USIA's refusal to carry out the order as

violating his federal constitutional right of due process and equal protection and as being arbitrary and capricious in violation of the APA.

The U.S. District Court for D.C. found that the grievance board lacked the authority to adjudicate Krc's complaint and granted the USIA's motion to set aside the board's order. The court dismissed Krc's APA-based claim, holding that the Foreign Service Act under which he was dismissed reserved the power to revoke limited Foreign Service appointments for security reasons to the Secretary of State in a manner which precluded judicial review for non-constitutional claims. It also held that the USIA had provided Krc with due process, but that even if it had not, his expectation of continued employment had not been infringed in a way that presented a constitutionally cognizable claim because Krc had been transferred to the domestic civil service at a higher salary.

The Court of Appeals for the D.C. Circuit affirmed, but remanded the case with instructions for the district court to consider Krc's equal protection claim and a related tort claim that the USIA had interfered with Krc's attempts to gain employment at another government agency.

On remand, the district court found that Krc had not been denied equal protection. The court found the reason he had been dismissed was the security risk posed by the indiscriminate nature of his conduct, not the gender of his partners. It also dismissed his tortious interference with employment claim, holding that the USIA had done no more than respond truthfully to the other agency's legitimate query for information relevant to its security check on Krc. The Court of Appeals affirmed. Cite: *United States Info. Agency v. Krc*, 989 F.2d 1211 (D.C. Cir. 1993).

4. ***Doe v. Cheney (1989)***. John Doe was a cryptographic material control technician with the National Security Agency (NSA) for 16 years. His Top Secret intelligence clearance was revoked and he was dismissed for cause after he admitted in a security interview that he had engaged in gay relationships with foreign nationals during that time. He was not provided an administrative hearing at which he could challenge the grounds for his dismissal, but he was allowed to appeal his decision to an NSA board of review and the Director of the NSA. The board and the Director both affirmed his dismissal on the grounds that his liaisons with foreign nationals, not his sexual orientation, rendered him a security risk. Doe challenged the dismissal in federal court, claiming that it violated NSA regulations requiring that employees dismissed for national security reasons be provided a hearing, as well as his federal constitutional rights of due process and equal protection.

The U.S. District Court for D.C. rejected Doe's claims, holding that it was within NSA's discretion to pursue either its routine dismissal procedures, as it did with Doe, rather than its power to dismiss an employee summarily for national security reasons. It also held that even if the agency had dismissed Doe solely because of his sexual orientation, the dismissal would be rationally related to a legitimate government interest in maintaining national security (*Doe v. Weinberger*).

The U.S. Court of Appeals for the D.C. Circuit reversed, holding that federal law (5 U.S.C. § 7532) required that an NSA employee dismissed for security reasons first be given an impartial hearing to review and challenge the charges, unless a specific determination by the Secretary of Defense found that such a hearing would be detrimental to national security.

The Supreme Court reversed the appellate court, holding that § 7532 was a discretionary removal procedure which was not required since Doe was dismissed under ordinary rather than summary dismissal procedures. It remanded the case for consideration of Doe's constitutional claim as well as whether NSA had violated its own regulations (Carlucci v. Doe).

On remand, the appellate court found that Doe's termination had been in accordance with NSA's regulations and that the procedures followed in terminating DOE had been sufficient to demonstrate that his claim that his dismissal violated his right not to be deprived of property or liberty without due process of law was without merit. The court further found that since Doe failed to demonstrate he was terminated because of his sexual orientation rather than because of his unauthorized liaisons with foreign nationals, his equal protection claim need not be reached. Cite: Doe v. Cheney, 885 F.2d 898 (D.C. Cir. 1989).

B. PRIVATE EMPLOYMENT CASES.

1. *High Tech Gays v. Defense Industrial Security Clearance Office (1990).* High Tech Gays brought this action on behalf of three gay men who worked for defense contractors. All three had been denied Secret or Top Secret industrial security clearances because of their sexual orientation. High Tech alleged that the respondents (DISCO) automatically subjected gay and lesbian applicants to expanded security investigations and frequently rejected their applications because DOD security regulations defined homosexual conduct as "deviant" sexual behavior that rendered an individual susceptible to coercion or blackmail. High Tech challenged these policies as violating gay individuals' federal constitutional rights of equal protection, due process and freedom of association.

The U.S. District Court for the Northern District of California granted summary judgment for High Tech Gays on its equal protection and freedom of association claims. The court held gay people constituted a frequently discriminated against "quasi-suspect" class of people who had a fundamental right to engage in homosexual activity, except sodomy per *Bowers v. Hardwick*. The court found DISCO's policies were based on irrational prejudice and outmoded stereotypes which were not even rationally related to a legitimate government interest. The court rejected DISCO's arguments that homosexual activity: (1) was criminal conduct; (2) was indicative of heightened potential for emotional instability; and (3) rendered gays and lesbians subject to blackmail or coercion. The court rejected High Tech's due process claim, interpreting it as a procedural due process claim which failed because applicants for clearances were given a sufficient opportunity to argue and appeal their decisions administratively.

The U.S. Court of Appeals for the Ninth Circuit reversed the district court and ordered that summary judgment be granted against High Tech Gays. It held that gay people did not meet all the criteria required to be considered a quasi-suspect class since the court considered being gay to be a behavioral rather than immutable characteristic and because it found gay people were not politically powerless. It further held the evidence presented by the government that foreign intelligence services targeted gay individuals provided a rational basis for automatically requiring expanded security investigations of gay and lesbian applicants. Cite: *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990).

2. *Dubbs v. Central Intelligence Agency (1990)*. Julie Dubbs was an open lesbian working for a defense contractor. Dubb's employer requested her security clearance be upgraded so she might have access to highly classified intelligence information. This request was turned down by the Central Intelligence Agency (CIA) on the grounds that Dubbs' failure to disclose her sexual orientation in previous security investigations indicated a perception of vulnerability and a practice of deception that made her a security risk. Dubbs challenged the decision in federal court, alleging the CIA employed a blanket policy of considering homosexual conduct to be either a disqualifying or negative factor in evaluating clearance requests, and that this violated the APA as well as her federal constitutional rights to freedom of association, due process and equal protection of law.

The district court granted summary judgment to the CIA on all counts, holding Dubbs' evidence did not present a triable issue of fact as to whether the CIA had such a blanket policy, and that the provisions of the APA did not apply to CIA decisions regarding security clearances.

The U.S. Circuit Court of Appeals for the Ninth Circuit reversed and remanded, finding that Dubbs had presented sufficient evidence of a potentially unconstitutional blanket CIA policy discriminating against gay people in granting security clearances to survive summary judgment. The court affirmed the district court's ruling that the APA's arbitrary and capricious standard did not apply to CIA security clearance decisions, holding the authority to make these decisions had been statutorily committed to the CIA's discretion by executive order (Executive Order 10865) and therefore its decisions could only be reviewed for constitutional claims.

On remand, Dubbs' amended her complaint to charge: (1) the CIA's alleged blanket policy violated its own procedures for reviewing clearance applications and thus its decision was arbitrary and capricious in violation of the APA; and (2) the policy violated her constitutional right to equal protection and freedom of association. The court dismissed the APA claim, holding the CIA acted in accordance with its regulations and that the appellate court's opinion foreclosed the question of whether those regulations could be reviewed judicially on a non-constitutional claim. The court rejected a motion to dismiss the constitutional claims, holding that as a matter of law they had stated a claim upon which

relief could be based and therefore should be allowed to proceed. Cite: *Dubbs v. CIA*, 769 F. Supp. 1113 (N.D. Cal. 1990).

3. *Gayer v. Schlesinger (1973)*. This case consolidated government appeals of three cases in which the U.S. District Court for D.C. set aside the Department of Defense's (DOD) revocation of industrial security clearances granted to three defense contractor employees. Each revocation was based on a DOD directive issued pursuant to Executive Order 10865, which granted the DOD authority to grant security clearances when doing so would be clearly consistent with the national interest.

In the first case (*Wentworth v. Schlesinger*), Wentworth had admitted he was gay and submitted to an extensive series of questions regarding intimate details of his private life. An administrative hearing board approved the withdrawal of his clearance, relying on a provision of the DOD directive that made any conduct that made an individual likely to be subject to coercion a relevant criterion in evaluating the individual's suitability for a clearance. The district court granted summary judgment to Wentworth, ruling the board relied solely on his admission and had failed to present any evidence that he was susceptible to coercion or blackmail. It also held that the scope of the questions violated Wentworth's federal constitutional right of privacy.

The U.S. Court of Appeals for the D.C. Circuit affirmed in part, holding the scope of the questions violated both the executive order, which it interpreted as prohibiting unnecessarily intrusive questions, and Wentworth's right of privacy. It remanded his case for further, less intrusive administrative proceedings. The court declined to consider the issue of whether or not a blanket policy of excluding gay people could be imposed, but suggested the relationship between sexual orientation and the potential for blackmail or disruption of the efficiency of the organization could justify denial of a security clearance in individual cases.

The second and third cases (*Gayer v. Schlesinger* and *Ulrich v. Schlesinger*) involved slightly different circumstances. Gayer and Ulrich admitted they were gay, but refused to answer detailed questions similar to those answered by Wentworth. Both of their clearances were revoked under a provision of the DOD directive that made failure to cooperate in a security investigation cause for revocation. In both cases, the district court found that since Gayer and Ulrich had admitted they were gay, additional questioning about their sexual orientation and conduct violated their federal constitutional right of privacy and ordered the suspension of their clearances set aside.

The appellate court affirmed the decision with respect to Ulrich, holding that although further questioning relevant to the issue of whether he presented a security risk was permissible, the scope of the questions presented to him violated the executive order and his right of privacy. It reversed the district court's reinstatement of Gayer, finding that his refusal to answer a second, modified set of less intrusive questions was unjustified. The

court remanded his case for further administrative proceedings so that he might be given an opportunity to respond. Cite: *Gayer v. Schlesinger*, 490 F.2d 740 (D.C. Cir. 1973).

4. *Adams v. Laird (1969)*. Robert Adams worked as an electronics technician for a defense contractor. At the instigation of his employer he applied for an upgrade of his industrial security clearance from Secret to Top Secret. The ensuing security investigation revealed Adams was gay. Adams application for an upgraded security clearance was denied and his existing clearance was suspended. Adams challenged the decision in the U.S. District Court for D.C., claiming that his federal constitutional right to due process of law was violated. The court rejected Adams' claim and granted summary judgment to the government. The U.S. Court of Appeals for the D.C. Circuit affirmed the district court's order, holding there was a rational basis for linking being gay with the potential for security problems and thus the denial of the clearance was constitutionally permissible. Cite: *Adams v. Laird*, 420 F.2d 230 (D.C. Cir. 1969), cert. denied, 397 U.S. 1039 (1970).

VIII. PRISONER CASES.

1. *Kelley v. Vaughn (1991)*. Richard Kelley was a prisoner at the Western Missouri Correctional Center. He brought this action challenging his dismissal from his job in the bakery at the Center, claiming that he was removed solely because he was gay. In an opinion reviewing the sufficiency of Kelley's *pro se* complaint, the U.S. District Court for the Western District of Missouri interpreted his complaint as alleging violations of Title VII and his federal constitutional rights of due process and equal protection. The court dismissed the Title VII and due process challenges, holding that judicial consensus had established Title VII did not protect against discrimination based on sexual orientation and that, as a prisoner, Kelley had no constitutionally protected interest in a particular job upon which to base a due process claim. The court held he had sufficiently alleged a claim of arbitrary discrimination to warrant fuller consideration of his equal protection claim and allowed his case to proceed. Cite: *Kelley v. Vaughn*, 760 F. Supp. 161 (W.D. Mo. 1991).

2. *Johnson v. Knable (1991)*. Steven Johnson was a prisoner at the Maryland Correctional Institute (MCI). He sued MCI and several of its officials in federal court, claiming he had been discriminated against in violation of § 1983 because he was denied a prison job because he was gay. The district court initially dismissed the case as frivolous, but was reversed by the U.S. Circuit Court of Appeals for the Fourth Circuit in an unpublished opinion holding Johnson had alleged a potentially cognizable claim that his federal constitutional right of equal protection had been violated. The case was remanded and the district court adopted a magistrate's evidentiary report and recommendation which found MCI had not discriminated against Johnson based on his sexual orientation. The Fourth Circuit again reversed the district court holding the district court had improperly failed to conduct a *de novo* review of the magistrate's decision after it was objected to by Johnson. Cite: *Johnson v. Knable*, No. 90-7388, 1991 U.S. App. LEXIS 12125 (4th Cir. May 28, 1991).

3. *Bush v. Potter (1989)*. Ray Bush, a prisoner in a Tennessee state work camp, sued the job coordinator and head kitchen steward at his camp, claiming they violated his federal constitutional rights by firing him from his job in the camp's kitchen because he was gay. The U.S. Court of Appeals for the Sixth Circuit affirmed the district court's dismissal of Bush's claim, holding that prison inmates have no constitutionally protected right to a particular prison job. *Bush v. Potter*, 875 F.2d 862 (6th Cir. 1989).

4. *Givens v. Shuler (1987)*. Isaiah Givens, a prisoner at the Philadelphia Detention Center brought this action against the warden of the Center alleging discrimination against the "homosexual population" in the assignment of jobs at the center in violation of 42 U.S.C. 1983. The U.S. District Court for the Eastern District of Pennsylvania dismissed the case for lack of standing because Givens and his fellow plaintiffs failed to establish they were members of the Center's gay population. Cite: *Givens v. Shuler*, No. 87-2856, 1987 U.S. Dist. LEXIS J4935 (E.D. Penn. June 8, 1987).

IX. BISEXUAL HARASSER CASES

Courts have construed sexual harassment in the workplace as a violation of the prohibition against sex-based employment discrimination contained in Title VII of the Civil Rights Act. Federal courts have reached inconsistent and sometimes bizarre results, however, in sexual harassment cases where the alleged harasser sexually harasses both males and females. Some courts have held that in cases involving a "bisexual harasser," Title VII's anti-sexual discrimination law is not violated given that the discrimination is targeted against both genders. Other courts, like the Seventh and Ninth Circuit Courts of Appeal, have transcended this constrained interpretation of Title VII and have found Civil Rights Act violations in "bisexual harasser" cases.

1. *McDonnell v. Cisneros (1996)*. Plaintiffs Mary Pat McDonnell and Thomas Boockmeier brought separate actions against the Department of Housing and Urban Development (HUD) alleging sexual harassment and retaliation in violation of Title VII. The allegations arose from HUD's allegedly abusive investigation of an anonymous letter which charged that these employees engaged in job-related sexual misconduct. Plaintiffs claimed that HUD investigators conducted their interviews in an unprofessional manner, and that their investigations "gave rise to even more lurid rumors, widely circulated within HUD, including rumors of incest and other sexual deviance" about the plaintiffs.

"The District of Columbia Circuit described the bisexual harasser as a supervisor who makes unwanted sexual overtures to both men and women employees. See *e.g.*, *Vinson v. Taylor*, 760 F.2d 1330, 1333 n. 7 (D.C. Cir. 1985); *Bundy v. Jackson*, 641 F.2d 934, 951 (D.C. Cir. 1981) (recognizing that the basis for discrimination for sexual harassment is not the employee's gender *per se* but the fact that the employee refused to submit to sexual advances he or she suffered in large part because of gender).

In support of its motion to dismiss, the government asserted that both plaintiffs, a man and a woman, were treated equally and were not discriminated against in HUD's investigation because of their gender. In response, the court stated that "such arguments interpret sex discrimination in too literal a fashion." Rejecting these arguments, the court opined that "it would be exceedingly perverse if a male worker could buy his supervisors and his company immunity from Title VII liability by taking care to harass sexually an occasional male worker, though his preferred targets were female." Cite: *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996).

2. *Tietgen v. Brown's Westminster Motors, Inc. (1996)*. In April 1994, Andre K. Tietgen was employed by Brown's Mitsubishi as a car salesman. Soon after his arrival, his supervisor, a man, began to make sexual remarks to him. After complaining of the harassing treatment and receiving a transfer to an affiliated car dealership, he was informed that because "of what they heard about [his] complaints at Brown's Mitsubishi, Brown's Mitsubishi/Brown's Pontiac was terminating him." Plaintiff brought an action against his former employers alleging same-gender discrimination and retaliation under Title VII.

Finding the word "sex" in Title VII synonymous with "gender," the court interpreted Title VII to "prohibit all employment discrimination based on an employee's sex or gender, whatever employer and employee gender combination may be involved." Thus, the court found that same-gender discrimination is within the statute's reach "provided the discrimination occurs *because* of the employee's gender." However, in a footnote, the court added that "the statute as written may not prohibit sexual harassment by a bisexual harasser" if the harasser solicits sex or sexual acts irrespective of an employee's gender. *Id.* Cite: *Tietgen v. Brown's Westminster Motors, Inc.*, 921 F. Supp. 1495 (E.D. Va. 1996).

3. *Steiner v. Showboat Operating Co. (1994)*. Barbara Steiner was hired as a blackjack dealer at the Showboat hotel and was soon promoted to floorperson. Jack Trenkle, a Showboat vice-president was her supervisor. Trenkle's clearly abusive and sexually offensive comments prompted an official reprimand and resulted in his eventual termination. Nevertheless, plaintiff brought suit alleging sexual harassment, retaliation, constructive discharge and intentional infliction of emotional distress against the casino.

In dicta, the court stated that "even if Trenkle used sexual epithets equal in intensity and in an equally degrading manner against male employees, he cannot thereby 'cure' his conduct toward women." In so finding, the court acknowledged the possibility that both men and women might have claims against Trenkle for sexual harassment thus implicitly challenging the bisexual harasser paradigm. Cite: *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994).

4. *Hopkins v. Baltimore Gas & Elec. Co. (1994)*. Plaintiff George E. Hopkins asserted claims of sex discrimination and retaliation under Title VII against his former employer, Baltimore Gas & Electric ("BG&E"). Hopkins claimed that he was (1) sexually

harassed by his male supervisor, (2) disciplined by that supervisor and others after he complained of the harassment, and (3) terminated by BG&E in retaliation for his having filed a complaint with the Equal Employment Opportunity Commission (EEOC).

Reaffirming the Fifth Circuit's decision in *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446 (5th Cir. 1994), the court held that Title VII did not provide a cause of action for an employee who claims to have been the victim of sexual harassment by a supervisor or co-worker of the same gender. In dicta, the court reiterated the dicta of a host of other cases which stated that the sexual harassment of an employee of either gender by a bisexual harasser is not actionable under Title VII. Citing *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986); *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982); *Bundy v. Jackson* 641 F.2d 934, 942 n.7 (D.C. Cir. 1981). Cite: *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp 822 (D. Md. 1994).

5. *Chiapuzio v. BLT Operating Corp. (1993)*. Plaintiffs Dale Chiapuzio, a resident housing manager, and his wife Carla Chiapuzio, an admissions clerk, were employed by the Wyoming Technical Institute (WTI). The Chiapuzios claimed that Mr. Bell, their supervisor, subjected them to "an incessant series of sexually abusive remarks" by boasting of his sexual prowess and stating that he could "do a better job of making love to Carla Chiapuzio than Dale could." Mr. Bell also subjected Plaintiff Clint Bean, a residential housing manager before his promotion to assistant housing manager, and his wife to a similar series of sexually abusive remarks. Plaintiffs filed a Title VII discrimination suit for sexual harassment against Mr. Bell.

In defense of his actions, Mr. Bell argued that his harassment of both male and female employees alike evidenced the fact that the discrimination was not based on gender. Rejecting this argument, and wary of the "bisexual harasser" doctrine, the court reasoned that since Bell never harassed male employees concerning sexual acts he wished to perform with them, and since he restricted his remarks to sexual acts he wished to perform on their wives, he had harassed the plaintiffs because of their gender. Finding that this "type of harassment" was exactly the type contemplated to fall within the purview of Title VII, the court denied Defendant's motion to dismiss. Cite: *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334 (D. Wyo. 1993).

6. *Rabidue v. Osceola Ref. Co. (1986)*. Plaintiff Vivienne Rabidue worked as an executive secretary before her promotion to an administrative assistant. Labelled an "intractable" and "troublesome" employee, she was dismissed within a year of her promotion. Plaintiff brought an action alleging sexual discrimination and sexual harassment in violation of Title VII, Michigan's Elliot-Larsen Act and the Equal Pay Act.

In dicta, the court reflected that "it is of significance to note that instances of complained sexual conduct that prove equally offensive to male and female workers would not support a Title VII sexual harassment charge because both men and women were

accorded like treatment." Cite: *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986).

7. *Vinson v. Taylor (1985)*. Citing direct precedent, the court reaffirmed its prior determination that Title VII does not prohibit sexual harassment by a "bisexual superior [because] the insistence upon sexual favors would . . . apply to male and female employees alike" (quoting *Barnes v. Costle*, 561 F.2d 983, 990 n.55; *Bundy v. Jackson*, 641 F.2d 934, 942 n.7). Thus, the court held that "bisexual harassment, however blatant and however offensive and disturbing, is legally permissible." Cite: *Vinson v. Taylor*, 760 F.2d 1330 (D.C. Cir. 1985).

X. UNANALYZED CASES.

The following cases have been cursorily reviewed, but have not yet been fully analyzed for the study:

Anonymous v. Macy, 398 F.2d 317 (5th Cir. 1968), cert. denied, 393 U.S. 1041(1969).

Aranoff v. Bryan, 569 A.2d 466 (Vt. 1989).

Board of Educ. v. Morales Calderon, 35 Cal. App. 3d 490 (1973), appeal dismissed and cert. denied, 419 U.S. 807 (1974).

Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979).

Governing Bd. v. Metcalf, 36 Cal. App. 3d 546 (1974).

Hart v. National Mortg. & Land Co., 189 Cal. App. 3d 1240 (1987).

Joachim v. American Tel & Tel Info. Sys., 793 F.2d 113 (5th Cir. 1986).

Lyde v. City of Akron, 729 F.2d 1461(6th Cir. 1984).

M.A.E. v. Doe, 566 A.2d 285 (Pa. Super Ct. 1989).

Madsen v. Erwin, 481 N.E.2d 1160 (Mass. 1985).

Manale v. Roussel, No. 87-2694, 1988 U.S. Dist. LEXIS 9744 (E.D. La. Aug. 29, 1988).

Marks v. Schlesinger, 384 F. Supp. 1373 (C.D. Cal. 1974).

McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971), cert. denied, 405 U.S. 1046 (1972).

McKeand v. Laird, 490 F.2d 1262 (9th Cir. 1973).

Morrison v. Board of Educ., 461 P.2d 375 (Cal. 1969).

Moser v. Board of Educ., 22 Cal. App. 3d 988 (1972).

Naragon v. Wharton, 737 F.2d 1403 (5th Cir. 1984).

National Gay Task Force v. Board of Educ., 729 F.2d 1270 (10th Cir. 1984), aff'd, 470 U.S. 904 (1984) (per curiam).

Newman v. District of Columbia, 518 A.2d 698 (D.C. 1986).

Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969).

Padula v. Webster, 822 F.2d 97 (D. D.C. 1987).

Polly v. Houston Lighting & Power Co., 825 F. Supp. 135 (S.D. Tex. 1993).

Richards v. Mileski, 662 F.2d 65 (D.C. Cir. 1981).

Richardson v. Hampton, 345 F. Supp. 600 (D. D.C. 1972)

Safransk v. Personnel Bd., 215 N.W.2d 379 (Wis. 1974).

Sarac v. Board of Educ., 249 Cal. App. 2d 58 (1967), overruled by *Morrison v. Board of Educ.*, 461 P.2d 375 (Cal. 1969).

Schlegel v. United States, 416 F.2d 1372 (Ct. Cl. 1969), cert. denied, 397 U.S. 1039 (1970).

Scott v. Macy, 349 F.2d 182 (D.C. Cir. 1964).

Scott v. Macy, 402 F.2d 644 (D.C. Cir 1968).

Smith v. Liberty Mut. Ins. Co., 569 F.2d 325 (5th Cir. 1979).

Swift v. United States, 649 F. Supp. 596 (D. D.C. 1986).

Thibault v. Woodward Governor Co., No. 058982, 1992 Conn. Super. LEXIS 1742 (Conn. Super. Ct. 1992).

Todd v. Navarro, 698 F. Supp. 871 (S.D. Fla. 1988).

Unified Sch. Dist. v. Labor and Ind. Rev. Commn., 476 N.W.2d 707 (Wis. Ct. App. 1991).

Valdes v. Lumbermen's Mut. Casualty. Co., 507 F. Supp. 10 (S.D. Fla. 1980).

Williams v. Hampton, 7 Empl. Prac. Dec. P9226 (N.D. Ill. 1974).

Yoder v. Yoder, 204 Ct. Cl. 931(1974).

Zaks v. American Broadcast Co. Inc., 626 F. Supp. 695 (C.D. Cal. 1985).

Zalewski v. MA.R.S. Enter. Ltd., 561 F. Supp. 601 (D. Del. 1982).

This summary was prepared by Stephen J. Curran, Georgetown University Law Center, and Anthony E. Varona, Jeffrey Foxworthy and Wendy Zazik, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

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APPENDIX II
COMPLAINTS OF DISCRIMINATION BASED ON SEXUAL ORIENTATION

CALIFORNIA						
	1991-1992	1992-1993	1993-1994	1994-1995	1995-1996	7/1/96 to date
Employment Discrimination Cases*	N/A	N/A	140	152	160	79
						TOTAL
						531

(Fiscal Year July 1st - June 30th)

*California only prohibits discrimination based on sexual orientation in employment

CONNECTICUT						
	1991-1992	1992-1993	1993-1994	1994-1995	1995-5/31/96	TOTAL
All Discrimination Cases*	21	22	36	25	42	146
Employment Discrimination Cases	19	31	28	23	40	141

(Fiscal Year July 1st - June 30th)

* Connecticut prohibits discrimination based on sexual orientation in housing, public accommodations, credit, state practices, services of the state, licensing, state educational and vocational programs, allocations of benefits, and employment

DISTRICT OF COLUMBIA			
	1994	1995	TOTAL
All Discrimination Cases	3	10	13
Employment Discrimination Cases	N/A	N/A	N/A

HAWAII						
	1990-1991	1991-1992	1992-1993	1993-1994	1994-1995	TOTAL
Employment Discrimination Cases	1	12	6	13	15	47

(Fiscal Year July 1st - June 30th)

• Hawaii prohibits discrimination based on sexual orientation in employment.

MASSACHUSETTS							
	1990	1991	1992	1993	1994	1995	TOTAL
All Discrimination Cases*	43	83	73	135	142	146	622
Employment Discrimination Cases	41	73	59	91	124	126	514

* Massachusetts prohibits discrimination based on sexual orientation in housing, credit, public accommodations, and employment

MINNESOTA					
	1993-1994	1994-1995	1995-1996	7/1/96 to date	TOTAL
All Discrimination Cases*	15	44	36	3	98
Employment Discrimination Cases	11	34	24	3	72

(Fiscal Year July 1st - June 30th)

* Minnesota prohibits discrimination based on sexual orientation in housing, public accommodations, public services, education, and employment

NEW JERSEY					
	1991-1992	1992-1993	1993-1994	1994-1995	1995-1996
All Discrimination Cases*	18	29	26	32	17
					122

(Fiscal Year July 1st - June 30th)

* New Jersey prohibits discrimination based on sexual orientation in public housing, public accommodations, real estate transactions, and employment -- 90-95% of sexual orientation cases are in employment

RHODE ISLAND			
	1994-1995	1995-1996	TOTAL
All Discrimination Cases	N/A	N/A	N/A
Employment Discrimination Cases	2	N/A	2

(Fiscal Year July 1st - June 30th)

VERMONT				
	1992-1993	1993-1994	1994-1995	TOTAL
All Discrimination Cases*	7	15	5	27
Employment Discrimination Cases	0	1	0	1

(Fiscal Year July 1st - June 30th)

* Vermont prohibits discrimination based on sexual orientation in housing, public accommodations, and employment

WISCONSIN														
	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	TOTAL
All Discrimination Cases*	41	45	41	74	62	81	99	71	108	111	121	129	130	1,113

* Wisconsin prohibits discrimination based on sexual orientation in housing, public accommodations, education, and employment. Approximately 90% of discrimination cases are in employment

Data compiled by: Rhonda M. Bethea, Georgetown University Law Center; John King, American Civil Liberties Union; and Albert Alderete, Human Rights Campaign

APPENDIX III



State of Georgia
Department of Labor - Employment Security Agency

FORM 4-1-64

SEPARATION NOTICE

DOCUMENTED

1. Employee's Name

a. State any other name(s) under which employee worked.

CASES

3. Period of Last Employment: From

4. REASON FOR SEPARATION:

a. LACK OF WORK ☐

b. If for other than lack of work, state fully and clearly the circumstances of the separation: This employee is being terminated due to violation of Company Policy. The Employee is Gay.

5. Employee received: ☐ Wages in Lieu of Notice ☐ Separation Pay ☐ Vacation Pay

In the amount of \$ _____ for period from _____ to _____

Employee Name

OF JOBGa. E.S.A. Account Number 083772-0
(Number shown on State Quarterly Tax and Wage Report, Form ESA-1)

Address

DISCRIMINATIONCity LEBANONState LA

ZIP Code

Employer's Telephone No.

615444-5533

(Area Code)

(Number)

NOTICE TO EMPLOYER

At the time of separation, you are required by the Employment Security Law, OCGA Section 34-8-170, to provide the employee with this document, properly executed, giving the reasons for separation. If you subsequently receive a request for the same information on an ESA-403FF or an ESA-418, you may attach a copy of this form to the response of your response.

I CERTIFY that the above worker has been separated from the service of the employer named herein and that the worker has been handed to or mailed to the worker.

BASED ON

who has first-hand knowledge of the separation

General Manager

(Title of Person Signed)

2-16-91

Date Completed and Released to Employee

SEXUAL ORIENTATION

OCGA SECTION 34-8-170, OF THE EMPLOYMENT SECURITY LAW
TAKE THIS NOTICE TO THE EMPLOYMENT SECURITY CLAIMS CENTER IF YOU FILE A CLAIM FOR UNEMPLOYMENT INSURANCE BENEFITS.

SEE REVERSE SIDE FOR ADDITIONAL INFORMATION.

ESA-900 (R-11/82)

"THIS
EMPLOYEE
IS BEING
TERMINATED
DUE TO
VIOLATION
OF COMPANY
POLICY.
THE
EMPLOYEE
IS GAY"

KNOWLEDGMENTS

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Gregory King	Mark Steitz
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Photographs of Cheryl Summerville and Ernest Dillon compliments of Judy Rolfe.

National poll conducted by Mellman Lazarus Lake, Inc. Regional numbers are derived from a national sample of 1,000. Where sample size is reduced, margin of error increases.

THE HUMAN RIGHTS CAMPAIGN FUND

The Human Rights Campaign Fund (HRCF), the largest national lesbian and gay political organization, works to end discrimination, secure equal rights, and protect the health and safety of all Americans. With a national staff, and volunteers and members throughout the country, HRCF lobbies the federal government on lesbian, gay, and AIDS issues; educates the general public; participates in election campaigns; organizes volunteers; and provides expertise and training at the state and local level.

This publication is dedicated to the courageous people who have shared their personal, often painful, experiences of discrimination in order to educate the public about this pervasive but little understood problem. Our hope is that, upon hearing these stories of injustice and hardship, fair-minded people will be moved to ensure that people are judged in the workplace solely on their performance and abilities.

Elizabeth Birch, Executive Director
Daniel Zingale, Public Policy Director

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The Human Rights Campaign Fund
P.O. Box 1396
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202.628.4160

For membership information, call:
1.800.777.HRCF

TABLE OF CONTENTS

The Problem ... Discrimination	page 3
The Mid-Atlantic.....	page 5
Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Virginia and West Virginia	
The Midwest	page 11
Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota Ohio, South Dakota and Wisconsin	
New England	page 17
Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island and Vermont	
The South.....	page 21
Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina South Carolina and Tennessee	
The Southwest.....	page 29
Arizona, Colorado, New Mexico, Oklahoma, Texas and Utah	
The West.....	page 34
Alaska, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington and Wyoming	
The Solution ... Fairness.....	page 41

THE PROBLEM OF DISCRIMINATION

Anti-Gay Job Discrimination is Widespread — and Legal

A fundamental American value holds that people who do their jobs, pay their taxes and contribute to their communities should not be singled out for unfair discrimination. Unfortunately, federal law does not extend this basic fairness to the untold millions of Americans who happen to be lesbian or gay. Lesbian and gay people are fired from their jobs, refused work, paid less and otherwise discriminated against in the workplace — with no basic protection under federal law.

A federal court ruled in the case of a Detroit postal worker who was harassed and beaten at work that, although he had clearly suffered discrimination because he was gay, "homosexuality is not an impermissible criteria on which to discriminate" under Title VII of the 1964 Civil Rights Act. "These actions, although cruel, are not made illegal by Title VII," the judge wrote. [Dillon v. Frank, 1992 U.S. App. LEXIS 766 (6th Cir. 1992).] Since federal civil rights laws do not cover this kind of discrimination, gay and lesbian people lack the most basic rights that should belong to all Americans.

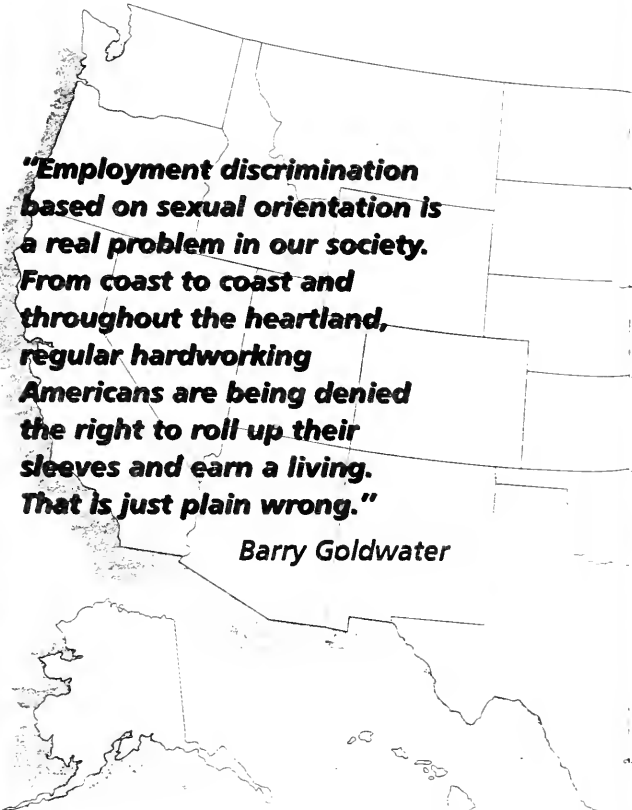
Discrimination Happens Everywhere

The lack of basic protections leaves millions of hardworking, taxpaying people vulnerable to unfair treatment. This report documents just a few examples of the discrimination faced by lesbian and gay — and heterosexual — people in every region of the country.

Most Americans Support Fairness

Most Americans believe this type of discrimination is wrong. National polls have consistently found that more than three-fourths of voters oppose anti-gay job discrimination and support equal rights in the workplace for lesbian and gay Americans. Unfortunately, seven out of 10 people polled do not know that their gay and lesbian family, friends, neighbors and coworkers lack the most basic rights under the law.

By publishing stories of hardworking men and women who have been treated unfairly in the workplace, we hope to create a broader understanding of the impact that discrimination has on the lives of real people. The cases documented here represent only a fraction of the uncounted people whose stories may never be told. Because of widespread discrimination and the lack of legal protections, many people find it impossible to discuss their experiences openly.



***"Employment discrimination
based on sexual orientation is
a real problem in our society.
From coast to coast and
throughout the heartland,
regular hardworking
Americans are being denied
the right to roll up their
sleeves and earn a living.
That is just plain wrong."***

Barry Goldwater

MID-ATLANTIC

SUPPORT

80.5%

OPPOSE

14.8%

More than eight of 10 Mid-Atlantic voters support equal rights in the workplace for lesbian and gay Americans.

From a poll conducted Nov. 8 and 9, 1994, by the independent firm of Mellman Lazarus Lake, Inc., of voters in Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Virginia and West Virginia.

SALESMAN FIRED FROM D.C. FURNITURE COMPANY

SUMMARY

Tim Bryson worked as a sales representative for a large home furnishings company, starting in 1993. After he compiled a stellar sales record in his first nine months, the company's CEO gave Bryson a \$15,000 raise and paid for him to move to Washington to help improve business in the metro D.C. market. Soon afterward, a former coworker threatened to tell Bryson's supervisor that he was gay. Two weeks later, Bryson was fired.

FACTS

Tim Bryson began working in January, 1993 as a sales representative in the regional office of a large home furnishings company. In nine months his sales had exceeded the company's target by 24 percent. When the company offered him a \$15,000 raise and asked him to move to Washington, D.C., to help improve sales in the D.C. area, he accepted. The company paid for his moving expenses.

Upon relocating to D.C., Bryson rented his previous home to a coworker who suspected that Bryson was gay. One day, the coworker spilled copier ink on Bryson's brand-new carpet. When Bryson asked him to pay for cleaning the carpet, the former coworker called Bryson "the biggest fag I've ever known" and threatened to tell Bryson's supervisor he was gay. Two weeks later, Bryson's supervisor told him "things are not working out" and that the company was "liquidating" Bryson's territory. But two weeks after that, the company hired someone else to take over Bryson's responsibilities. The supervisor explained to Bryson's replacement that he had learned that Bryson was gay from Bryson's former coworker.

M I D A T L A N T I C

STOCKBROKER AND MARYLAND COMMUNITY VOLUNTEER TERMINATED

SUMMARY

Mike Engler worked as a stockbroker for a financial services company in Cumberland, a small Maryland town. For many years, Engler volunteered for Cumberland community organizations, serving on the board of the local Red Cross, the local college's Economic Development Committee, and the local country club's Long-Range Planning Committee. Nevertheless, in 1989, after learning Engler was gay, the company president fired him, claiming that he was not "compatible" with the company or the community and could not "participate in things expected" of him.

FACTS

For many years, Mike Engler, a stockbroker, participated actively in the civic life of Cumberland, serving on the board of the local Red Cross, the local college's Economic Development Committee, and the local country club's Long-Range Planning Committee. Then, in 1985, a local financial services company hired Engler away from another firm to start a brokerage division.

Under Engler's leadership, the new division became highly profitable. But after Engler bought a home in Cumberland and moved in with his life partner, the company fired him. The president and the board chair explained that Engler was not "compatible" with the company or the community, and that he could not "participate in things expected" of him.

After the company fired Engler, it refused to give him a reference and he could not find another job as a stockbroker. He had to sell his house and spend all of his savings and retirement money; eventually he took a job as a bartender. When he did find work as a stockbroker, his former employer spread the word about Engler being gay. Engler could not build a clientele, and again had to take a job as a bartender. Today Engler once again works as a stockbroker.

"The time has come to protect the basic rights of persons who are oppressed because of their sexual orientations."

Justin Dart

M I D - A T L A N T I C

PENNSYLVANIA LEGAL WORKER PROMOTED AND FIRED BY NEW MANAGER

SUMMARY

John Curlovich, a gay man, began work at a Pittsburgh-based litigation support company, in a temporary position as a document coder. Soon after he started, the company promoted Curlovich into a permanent management position. But a new manager was hired who found the fact that Curlovich was gay "offensive." The new manager demoted Curlovich back to document coder, and eventually fired him.

FACTS

John Curlovich began work in May, 1988, in a temporary position as a document coder at a litigation support and information management company in Pittsburgh. Curlovich so impressed the company that, soon after he started, he was promoted to a permanent management position with a large increase in pay. Curlovich's supervisors and coworkers knew he was gay, but it made no difference to them. While working at the company, Curlovich earned several bonuses as "employee of the week."

Then, in March, 1990, the company hired a new manager to supervise the Pittsburgh office. Two months later, the new manager called Curlovich into her office. People find your "personal preference" offensive, she told him. When he asked whether she was referring to his being gay, she repeated, "People find that offensive." A few minutes later, she ordered Curlovich to leave her office, and slammed the door behind him.

Two weeks later the manager demoted Curlovich back to document coder, with a significant decrease in pay. The following month, June, 1990, Curlovich was fired.

The Philadelphia Inquirer

Unprotected

Gay men deserve federal help battling workplace bias

When gays and lesbians march by the tens of thousands, as they did in New York City last Sunday, it gets people thinking about gay rights. But does it shift public opinion? The march is history of an inscription against police harassment 25 years ago, served as a reminder of the movement that blossomed here. At the time, the "gay liberation" movement was in its infancy.

We endorse this bill because it is right. It would be right even if it weren't popular. Yet it is so popular that in a recent poll, three out of four Americans support it.

M I D - A T L A N T I C

PENNSYLVANIA MANAGER FIRED UNDER ANTI-GAY CONTRACT

SUMMARY

Dan Miller was an outstanding employee on his way to being made a partner in a management consulting company. Then his boss saw Miller on TV discussing hate crimes against lesbians and gay men. Miller's boss then used the contract Miller had been required to sign, which explicitly stated that "homosexuality" was just cause for dismissal, to fire Miller. When a number of the company's clients followed Miller, Miller's former boss first mailed a letter to these clients revealing Miller's sexual orientation and advising them to ask Miller for results of an AIDS test. The company then successfully sued Miller for \$130,000 for alleged violation of a non-competitive clause of the contract.

FACTS

In 1986, Dan Miller was hired by a management consulting company. Miller's employment contract provided that cause for termination included "not working, intentionally working slowly, intentionally losing clients,... and homosexuality."

The company clearly found Miller's performance exemplary, as evidenced by the fact that Miller's boss was planning to make him a partner in the firm. Then, in October of 1990, Miller appeared on television to represent a coalition of citizens in its efforts to address violent crimes directed at lesbians and gay men. Shortly thereafter, the company fired Miller without granting severance pay, and even refused to reimburse Miller for \$1500 of agreed upon business expenses. Citing the provisions of the employment contract, Miller's boss has since testified under oath that the termination was based solely on the fact that Miller was gay.

Thereafter, Miller's boss challenged, albeit unsuccessfully, Miller's unemployment benefits and even challenged Miller's membership in a leading professional organization for management consultants. Most significantly, Miller's boss attempted to undermine Miller's efforts to establish his own business. He not only informed Miller's clients that Miller was gay, but also stated to them, "It's well known that homosexuals are significantly at risk for AIDS. . . . [C]onsider getting the results of a blood test from him, if you are considering using his services on a long-term basis."

Ironically, Miller's boss not only fired him, but successfully sued Miller for violating a non-competition clause in the employment contract because a number of the firm's clients followed Miller to a new company. Miller was forced to pay his former employer a \$130,000 judgment. At the conclusion of the case, one of the jurors came forward and stated, "It was outrageous to hear intolerance like that in a court of law, where people come to seek protection from intolerance. But the law was silent."

"It was outrageous to hear intolerance like that in a court of law, where people come to seek protection from intolerance. But the law was silent."

Juror in Miller Case

GINIA FACILITY WORKER RUPTLY DISMISSED FROM JOB

SUMMARY

Jennifer Lynch worked in Arlington as a residential facility for mentally retarded adults in 1993 and early 1994. After Lynch's partner came out to her mother, the partner's mother called the facility's administrator to discuss the fact that Jennifer was a lesbian. A few days later, the facility fired her abruptly.

FACTS

Jennifer Lynch worked in Arlington as an aide at a residential facility for mentally retarded adults. Lynch supervised the residents, distributed prescription medication, and ran educational programs.

From the beginning, Lynch was honest about being a lesbian, which initially caused no trouble. Indeed, both performance reviews she received rated her work as excellent.

Then, two months after she started, the facility acquired a new supervisor. The new supervisor announced a policy for visits by friends of live-in aides, requiring that, except in an emergency, live-in aides get his permission in advance to have guests. The aides had to tell him who would be visiting, the nature of their relationship, and the purpose and anticipated length of the visit.

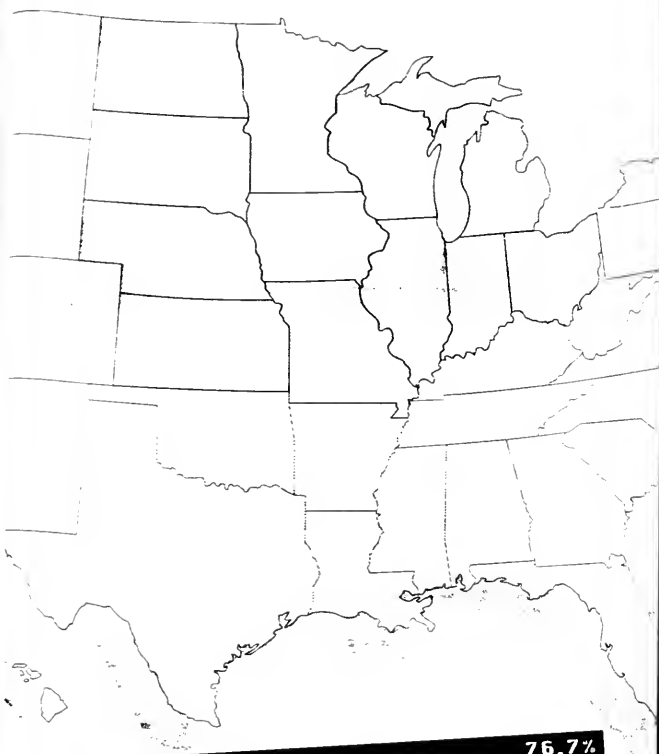
Lynch discussed this policy with the supervisor. He assured her that she did not need to seek his permission to have a guest, and that he was mostly concerned with visitation during working hours. He added that, for liability reasons, he would like to know if a guest planned to stay overnight.

The next day, Lynch received a frightening telephone call. Her partner, Heidi, had recently come out to her parents, and they had thrown Heidi out of the house. She had no money and nowhere to go. When Heidi went to retrieve some of her personal possessions, her mother physically assaulted her, leaving Heidi bruised and bleeding. Lynch immediately notified her supervisor that she had an emergency and that Heidi would be staying with her for the night.

But before they reached the facility, Heidi's mother called and spoke to Lynch's supervisor. Later that evening, the company vice president called to insist that Heidi could not stay there. The next day, Lynch was suspended. When she asked her supervisor for an explanation, he told her she had not been "discreet."

The following week, Lynch was fired. Her supervisor gave as his principal reason "evidence of insubordination," which he refused to explain further.

THE MIDWEST



SUPPORT

76.7%

OPPOSE

17.1%

More than three of four Midwestern voters support equal rights in the workplace for lesbian and gay Americans.

From a poll conducted in February, 1994 by the independent firm of Mellman Lazarus Lake, Inc., of voters in Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota and Wisconsin.

RECOMMENDED APPLICANT DENIED KANSAS JOB DUE TO "TENDENCIES"

SUMMARY

Vernon Jantz, a married heterosexual, applied for a job in 1988 as a teacher/coach at the Wichita North High School. Although the department director recommended Jantz for the job, the principal hired someone else, explaining that he had rejected Jantz because of supposed "homosexual tendencies."

FACTS

Vernon Jantz is heterosexual, married, and the father of two children. In 1987 and 1988, Jantz often substituted throughout the Wichita school district, including in the Wichita North High School social studies department. When Wichita North announced an opening for a full-time teaching position, Jantz received sterling recommendations from fellow teachers, including the director of the Wichita North social studies department.

But the principal's secretary remarked that Jantz reminded her of her ex-husband, who she thought was gay. As a result, the principal hired someone else. When the department director asked the principal why he had not hired Jantz, the principal explained that he had rejected Jantz because of his "homosexual tendencies."

Jantz sued the principal in federal court. But lacking anti-discrimination protections covering sexual orientation, Jantz lost his case (976 F.2d 623 (10th Cir. 1992)).

*"There is no
legal, social, or
moral justifica-
tion for denying
homosexual
persons access
to the basic
requirements
of human social
existence..."*

*United Presbyterian
Church, U.S.A.*

T H E M I D W E S T

DETROIT POSTAL WORKER HARASSED AND BEATEN AT WORK

SUMMARY

Ernest Dillon of Detroit worked for the U.S. Postal Service. He suffered severe verbal and written harassment on the job, but his supervisors refused to intervene. Eventually, his harasser beat Dillon unconscious, causing injuries from which Dillon needed weeks to recover. When he returned to work, his attacker had been fired, but other coworkers kept up the harassment. This lasted for several years, until, in 1988, under a therapist's instructions, Dillon left work. Eventually, Dillon filed a federal court action under Title VII of the 1964 Civil Rights Act. Although sympathetic, the federal court of appeals in 1992 rejected Dillon's claim, ruling that "homosexuality is not an impermissible criteria on which to discriminate."

FACTS

Ernest Dillon worked for the postal service as a mail handler at the Allen Park Bulk Mail Center. From 1980 to 1984, Dillon worked quietly and reliably, without incident. Then, in 1984, a fellow employee began to harass Dillon, both verbally and in writing, shouting out "fag" and obscene statements when Dillon passed by. Dillon reported the incidents to his supervisor, who refused to intervene.

One day his harasser cornered Dillon and beat him unconscious, leaving bruises and wounds that required several stitches to close and caused Dillon to miss three weeks of work. Dillon's attacker was fired, but two other employees kept up the harassment. Management still refused to intervene. After enduring this harassment for three more years, Dillon was emotionally crushed and unable to work. Under instructions from a therapist, in 1988 Dillon left work.

Dillon filed a federal court action under Title VII of the 1964 Civil Rights Act. Although sympathetic, in 1992 the federal court of appeals rejected Dillon's claim. Had the harassment occurred on the basis of race or gender, the court noted, Dillon would have a clear case. But because "homosexuality is not an impermissible criteria on which to discriminate," the court dismissed Dillon's case (952 F.2d 403 (6th Cir. 1992)).



MICHIGAN FLORIST FORCED OUT AFTER DURING ANTI-GAY REMARKS

SUMMARY

Steve Vanston of Lansing, Michigan, worked as a florist. At a 1992 job interview, his prospective employer asked whether the female friend waiting to take him home was his "girlfriend." At work, coworkers regularly made anti-gay remarks. Nevertheless, Vanston got positive reviews and raises, until his employer learned he was gay. Soon afterwards, Vanston's employer altered his job responsibilities and cut his hours so much that Vanston lost his eligibility for health insurance and left his job.

FACTS

When Steve Vanston interviewed for a job with a florist in Lansing, Michigan, Vanston's prospective boss asked if his roommate, who was waiting to pick him up, was his "girlfriend." Vanston was hired as the store's sales manager. Soon after Vanston started work, the general manager said, "thank God" he had a girlfriend, because "we all thought you were a fag."

Vanston set sales records and received positive reviews and raises the first several months of his work at the shop. Vanston's boss even asked him to do bill collection after hours, for extra pay.

But one day a friend of Vanston's died in a car accident. Many of Vanston's friends came to the store to buy flowers for the funeral. "Was your friend a fag?" asked one of Vanston's coworkers. When Vanston told her the friend was gay, she continued, "I thought so. We've noticed a lot of fags in here lately."

A short time later, Vanston's boss called one of his former employers. At the end of a long series of questions about Vanston's work performance, Vanston's boss asked, "Is Steve a homosexual?" and then, "Is he a practicing homosexual?" Surprised by the questions, Vanston's former employer answered truthfully that Vanston was gay.

Soon afterwards, store management asked Vanston to take several days off without pay. Then his supervisor added routine store maintenance to Vanston's duties. Around this time, the owner's son told a store employee, "We know Steve is gay; we think Ed [another employee] is gay. Keep your ear to the ground because we want to eliminate them."

Shortly thereafter, Vanston's supervisor removed him from sales altogether and reduced his hours to part-time, causing the loss of his health insurance. When Vanston complained, his supervisor responded, "We can do whatever we want." When she then told Vanston he could not take long-promised time off to pick his mother up at the airport, Vanston resigned.

**"It is time to
stop this blatant
workplace
discrimination.
Workers in all
occupations have
been fired, and
continue to be
fired, because
they are gay or
lesbian."**

Richard Womack,
Director of Civil
Rights, AFL-CIO

T H E M I D W E S T

QUALIFIED MINNESOTA MAN PASSED OVER FOR PROMOTION, FORCED OUT

SUMMARY

Perry Merz was hired for a part-time position at a funeral home with the explicit understanding that he would be offered the first available full-time position. On three separate occasions, full-time positions were filled with individuals from outside the company with significantly less experience than Merz, who is gay. After repeatedly voicing his concerns to his employers, Merz was offered a 50-hour/week night shift position at a lower hourly wage than he was making in the part-time position. When Merz refused the position, he was forced out of the company.

FACTS

In October of 1990, Perry Merz, a gay man, sought employment with a funeral home after his previous employer declared bankruptcy. The funeral home was part of the largest conglomeration of funeral homes and cemeteries in the world. Merz was offered a part-time position and explicitly promised that he would be offered the first available full-time position.

Thereafter, in spite of Merz's excellent performance evaluations and over fifteen years of education and experience as a funeral director, the funeral home did not offer Merz a full-time position on three separate occasions. Instead, it filled all of these positions with outsiders who had significantly less experience than Merz. Later, Merz learned that the general manager had stated, "I'm not hiring any gays because there are too many problems."

Merz repeatedly voiced his concerns to his employer. In March of 1992, the funeral home responded by offering Merz a fifty-hour-per-week full-time position on the night shift, with no possibility of a position on the day shift and no job security. Although at the time, a licensed employee working a forty-hour-per-week position earned between \$30,000 and \$35,000 per year, Merz was offered only \$23,000 per year — an hourly wage less than that earned in his part-time position. Moreover, the funeral home stated that it would terminate Merz if he failed to accept the position. Because Merz refused the offer, he was forced out of the company on Saturday, May 2, 1992.

NO WORKERS THREATENED AND FIRED

SUMMARY

Robert Lewis of Akron worked for several months at a North Canton mail order company. After learning he was gay, his coworkers subjected him to repeated verbal harassment and slashed his tires. Finally, a coworker told Lewis, "We've driven out others like you." Fearing for his safety, Lewis gave up his job.

FACTS

Robert Lewis began working on the production line of a North Canton mail order company in March, 1994. All went well Lewis' first few weeks on the job. But his supervisor had dated Lewis' sister, and soon Lewis' coworkers all seemed to know he was gay.

Lewis immediately became the target of persistent verbal harassment. Coworkers would call him "faggot" and other derogatory terms. The situation grew worse, and eventually someone slashed the tires of Lewis' car in the company parking lot. When Lewis mentioned that he might file a complaint with the Equal Employment Opportunity Commission, his supervisor warned Lewis that filing an EEOC complaint would get him fired.

After four months of constant harassment, Lewis resigned.

SUMMARY

After over thirteen years at a Fortune 500 company, Joyce Perciballi of Canton had worked her way up from a position as a clerk to management. But in early 1994, following her own supervisor's announcement to the entire department that Perciballi was a lesbian, three supervisors interrogated her repeatedly about her sexual relationships, and a week later, fired her.

FACTS

Joyce Perciballi of Canton worked at a Fortune 500 company for over thirteen years. She started as a clerk and advanced to the position of manager. During that time, she received five quality awards from the company and 27 complimentary letters from customers, including one that said "there should be more Joyce Perciballis."

While at the company, a few of Perciballi's coworkers knew she was a lesbian. During a meeting in 1991 that Perciballi did not attend, her supervisor announced that Perciballi was a lesbian to the entire department. Early in 1994, three of Perciballi's superiors summoned her into an office where they interrogated her for an hour about her sexual relationships. Two days later came another interrogation, this time for three hours, followed by two lengthy telephone calls to her home.

The next week, she was fired. A lawyer told her "It's a sad story, but it's not against the law."

NEW ENGLAND

SUPPORT

79.5%

OPPOSE 11.2%

Nearly eight of 10 New England voters support equal rights in the workplace for lesbian and gay Americans.

From a poll conducted Nov. 8 and 9, 1994, by the independent firm of Mellman Lazarus Lake, Inc., of voters in Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island and Vermont.

N E W E N G L A N D

THE EMPLOYEE WITH GOOD RECORD LEAVES JOB UNDER THREAT

SUMMARY

For three years, Robin Lambert directed employee relations at a large manufacturing company in Portland. Despite having received numerous raises and positive evaluations, Lambert was told by his supervisor that, if rumors that Lambert was gay proved true, the company would fire him. Lambert worked for a few months under constant fear of detection, and finally left his job.

FACTS

For three years, Robin Lambert worked at a large manufacturing company in Portland. As director of employee relations, he compiled an excellent performance record and received a commendation from the president. Then, one day, the vice president of administration, Lambert's supervisor, invited Lambert to lunch to discuss his future at the company.

The vice president said he had heard rumors that Lambert was gay. He warned Lambert that, if the rumors proved true, he would have to fire Lambert, because other employees, knowing Lambert was gay, would refuse to "deal" with him. He directly asked Lambert if he was gay.

Lambert avoided answering the question and asked the vice president if he had actually heard any complaints about his work performance. The vice president admitted no one had complained, and the conversation ended soon thereafter.

Lambert worked at the company for several months after that, under constant fear. When Lambert left his job, 650 of the company's employees signed his farewell card and contributed to a \$1000 goodbye gift.

"It has been the law of the land that employment discrimination is unacceptable based on race, gender, religion, ethnic origin or other non-performance-related considerations. It is time to include sexual orientation. It is the right thing to do. It is the sensible thing to do. It is also the business-like thing to do."

Warren Phillips
Former CEO & Chair,
Dow Jones &
Company, Inc.

N E W E N G L A N D

MASSACHUSETTS PROFESSOR DISCHARGED IN FACE OF STUDENT THREAT

SUMMARY

Karen Harbeck began teaching as an assistant professor at the University of Lowell (now University of Massachusetts at Lowell) in 1986. When the dean hired her, he acknowledged her credentials and accomplishments, and promised to promote her within one year. But a student began threatening Harbeck's life, carrying a gun onto the campus and saying that God had "ordained" him to "kill all homosexuals." Suddenly, the university administration told Harbeck they no longer needed either her courses or her services. Later, Harbeck learned that the school had hired another professor to teach her courses.

FACTS

Karen Harbeck had an impressive academic background, including a doctorate, a law degree, and two master's degrees. When the University of Lowell (now University of Massachusetts at Lowell), in 1986, hired her to teach human relations and minority issues, the dean acknowledged her outstanding credentials and promised her a promotion within one year.

Harbeck's classes went extremely well. In some classes, with the dean's approval, discussions about minorities included references to gays and lesbians. Harbeck consistently received the highest praise in student evaluations and in feedback from her peers.

But then one of Harbeck's students began to threaten her, bringing a gun onto campus and announcing that God had "ordained" him to "kill all homosexuals," specifically including Harbeck. The dean refused to intervene, and campus security only issued the student a warning.

Soon afterwards, the university administration notified Harbeck that the school no longer needed either her courses or her services and that it was terminating her contract. But the university never cancelled Harbeck's courses. Instead, the school hired another professor, one with no background in human relations or minority issues, to teach the same courses.

Harbeck contacted the Massachusetts Commission Against Discrimination. According to Harbeck, the commissioner refused to intervene, explaining that he feared losing his own job.

N E W E N G L A N D

NEW ENGLAND WORKERS FIRED AND DENIED JOBS

FACTS

After a year working as a warehouse manager in the Concord, N.H. area, by 1990 Ron Lambert had established an unequalled performance record. He had met and surpassed shipping quotas, reduced costs, and received regular praise, additional responsibilities, and unusually large raises and bonuses.

Lambert had also established friendships with a few other managers at the warehouse and had met their spouses and families. Lambert began to be honest about his identity as a gay man to these coworkers. Suddenly, without warning, the director of operations summoned Lambert into his office, announced that Lambert was "not the man for the job," gave him a final paycheck, and escorted him off the premises. The company gave Lambert no other explanation for his firing; a fellow manager corroborated Lambert's belief that the company fired him for being gay.

FACTS

By 1993, A.J. had received Emmy award nominations for his television work and had done AIDS education for a state health department. Then he applied for the position of assistant director of public information for a prominent substance abuse treatment center in New York City.

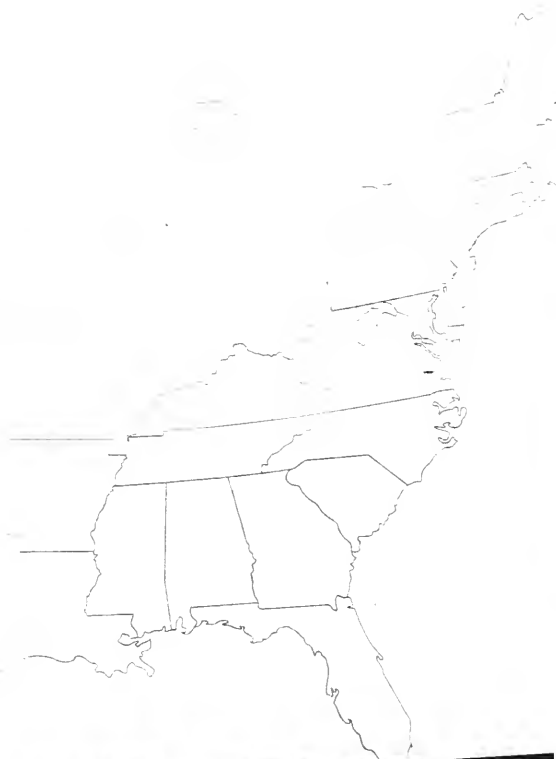
The substance abuse treatment center gave very serious consideration to A.J.'s job application. Between August and October, 1993, A.J. spent nearly 40 hours interviewing and testing for the position.

Near the end of this process, the director of public information asked A.J. what he was doing while looking for a job. A.J. told her he was helping a journalists' organization organize a panel for a conference. The director asked the name of the organization, and A.J. told her it was the National Gay and Lesbian Journalists Association. The director then asked A.J. if he belonged to this organization. A.J. replied truthfully that he was an active member, and asked if that would pose a problem.

The director replied that she had no problem with A.J.'s involvement with the journalists' group. Then, looking up at the ceiling towards the office of the president, she continued: "But some of the people here wouldn't be comfortable with a gay employee in such a public position. Even if it wasn't this position, there would be other people who would be uncomfortable."

A.J. was denied the job.

THE SOUTH



SUPPORT

63.2%

OPPOSE

22.4%

A strong majority of Southern voters support equal rights in the workplace for lesbian and gay Americans.

From a poll conducted Nov. 8 and 9, 1994, by the independent firm of Mellman Lazarus Lake, Inc., of voters in Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee.

T H E S O U T H

ALABAMA STUDENT WITH "PERFECT" RECORD FIRED FROM JOB

SUMMARY

In 1990 and 1991, in order to earn graduate school tuition, John Howard gave tours of a regional paper company's large private art collection. Another employee told Howard's supervisor that Howard was gay. The supervisor called Howard in, acknowledged that his work was "perfect," and asked him if he were gay and belonged to any gay organizations. After learning that Howard was president of the University of Alabama Gay and Lesbian Alliance, the supervisor fired him.

FACTS

Starting in November 1990, John Howard led tours at a regional paper company's corporate art collection to earn graduate school tuition at the University of Alabama. He served as president of the Gay and Lesbian Alliance. Late in the school year, another employee told Howard's supervisor that Howard was gay. On May 20, 1991, his supervisor called Howard in, acknowledged that his work was "perfect," and asked him if he were gay and if he belonged to any gay organizations. Howard answered "yes" to both questions. His supervisor then declared that Howard being gay had suddenly become a "problem."

Four days later, Howard's supervisor called him by telephone, repeated that Howard had "done a great job," and claimed that if "nobody knew" Howard were gay, he could keep his job. But since Howard was "president of this organization and their chief spokesman," the supervisor fired him.

Southern Voice/June 20, 1991

**Alabama man fired
for being gay**

T H E S O U T H

TAMPA BARTENDER REPLACED BECAUSE SHE IS NOT GAY

SUMMARY

Carolyn O'Neill is heterosexual. When, in late 1993, the Tampa, Florida, bar where she worked as a waitress decided to market primarily to lesbian and gay customers, the bar fired all of the heterosexual staff, including O'Neill. The Tampa lesbian and gay community learned about the bar owner's discrimination and staged a boycott; the bar subsequently went out of business.

FACTS

Carolyn O'Neill is a single heterosexual mother of three young children. She relied on her job at a Tampa bar to support herself and three sons. In late 1993, the bar's owners decided to target a gay clientele and fired their heterosexual employees, including O'Neill.

After these firings gained publicity, many of Tampa's gay and lesbian citizens mounted a boycott of the bar to protest the discrimination O'Neill and others had suffered. The bar, with its business undermined, shut down shortly thereafter. As a boycott leader observed, "Sexual orientation has no bearing on your capacity to mix drinks. Discrimination is wrong whether it's directed against gays and lesbians or straights."



MARVIN T. JONES & ASSOCIATES

U.S. Attorney General Janet Reno recognizes the problem of anti-gay job discrimination.

T H E S O U R C E

ORLANDO SUPERVISOR FIRED AFTER INVESTIGATION OF PERSONAL LIFE

SUMMARY

Raymond Stinchcomb worked at a fast-food franchise in Orlando. He received excellent evaluations, and after three years earned a promotion to area supervisor. But after Stinchcomb divorced his wife, rumors started circulating that he was gay. After an investigation, the company vice president fired him, saying, "We don't have to give you a reason, but you know why."

FACTS

Raymond Stinchcomb began working in 1979 at an Orlando franchise outlet of one of America's largest fast-food chains. He regularly received excellent evaluations, and the company enrolled him in management training courses. By 1982, at the age of 25, he had earned a promotion to area supervisor—the youngest in the company. In 1987, after he had successfully opened several new restaurants in his area, the regional director—Stinchcomb's immediate supervisor—promised to recommend Stinchcomb for the next promotion opportunity.

That same year, Stinchcomb and his wife divorced, sparking rumors that Stinchcomb was gay. In January, 1988, the regional director asked the manager of each of Stinchcomb's restaurants whether Stinchcomb was gay. A few days later, the vice president of operations told Stinchcomb the company was investigating him, but wouldn't specify the reason for the investigation. Later that same day, Stinchcomb received a telephone call from another gay employee of the company, who reported that he had just been fired and warned Stinchcomb that a "witch hunt" had started.

The following day, the vice president fired Stinchcomb. He told Stinchcomb, "You've done a great job," and even promised to give him a good recommendation. But the vice president refused to explain his decision to fire Stinchcomb, saying "We don't have to give you a reason, but you know why." After a few months of unemployment, Stinchcomb filed for bankruptcy.

T H E S O U R C E

AUTO SALESMAN SACKED FROM TWO GEORGIA DEALERSHIPS

SUMMARY

Dean Hall of Augusta suffered discrimination at two different jobs as a car salesman in 1992. At each job, Hall's male companion would regularly drop him off in the morning. At the first job, after three weeks the assistant manager fired Hall and refused any explanation, saying it wasn't any of his "damn business." At the second job, again soon after he started work, the general manager fired him, explaining only that Hall's "image" was not "compatible" with the dealership.

FACTS

An active member of his church, Dean Hall of Augusta was honest with his fellow parishioners about his identity as a gay man. Some church members, including the manager at the store where Hall worked, began to talk about Hall being gay. Soon thereafter, the store closed, Hall was the only employee passed over for a transfer to a new job.

Hall then took a job as a salesperson at a local car dealership. Hall's manager regularly saw Hall with his male companion, who dropped Hall off and picked him up from work. Hall had been at the job for only three weeks and had just sold his first car when he was fired. Asked why, the general manager told Hall that "it's not any of your damn business and I don't have to tell you anything."

Hall found a job at another car dealership. Again, his companion would drop Hall off and pick him up. One day a few months into his employment, Hall noticed that a sale of his had been credited to another employee.

When Hall asked the general manager about it, the manager ushered Hall into a small windowless room and returned with a resignation letter he urged Hall to sign. Pressed for an explanation, the manager would say only that Hall's "image is not the kind we want at the dealership."



SOUTHEASTERN RECRUITING MANAGER DID NOT TO PROMOTE GAYS

SUMMARY

In 1991, when Meredith Daley—who is heterosexual—was southeast regional recruiting manager for a national clothing retailer, she received instructions not to forward, for management positions, the names of any employees who even appeared to be lesbian or gay. In particular, the director of field recruiting told Daley they were planning to fire Atlanta district manager Terry Stowe because he was gay. Around that time, the regional vice president began excluding Stowe from regional manager meetings and dinners. In January, 1992, the regional v.p. forced Stowe to resign, claiming that he was not "promotable."

FACTS

Terry Stowe began work in 1982 as a part-time sales representative for a national clothing retailer. By 1991, Stowe had worked his way up to the position of manager. Along the way, he had received commendations, raises, and large bonuses. Yet speculations that he was gay had long made him the target of pressure within the clothing chain's administration, especially from the regional vice president, who called gay employees "flits" and would often press Stowe to call women employees for dates.

Eventually, the regional vice president realized Stowe was gay. Soon afterwards, the director of field recruiting told southeast regional recruiting manager Meredith Daley that the company planned to fire Stowe for being gay. Earlier, Daley had received instructions not to forward, for management positions, the names of any employees who even appeared to be lesbian or gay.

The regional vice president then began excluding Stowe from regional manager meetings and dinners. In December, 1991, the regional v.p. told Stowe that he was not going any further with the company and that it would be best if he resigned. The vice president refused to give Stowe any further explanation. Stowe's job ended in January, 1992.

Around the same time, Daley learned that the company had terminated a store manager in Asheville, North Carolina, even though he had a record of high sales. When she asked why, she was told the company had terminated the manager solely because he was gay.

*"...Because she's
a damn lesbian, I
am not going to
put a lesbian in a
position like
that. If you want
to call me a
bigot, fine."*

Sen. Jesse Helms,

*referring to Roberta
Achtenberg, nominee
for assistant secretary
of the Department of
Housing and Urban
Development.*

T H E S O U T H

GEORGIA AWARD-WINNING COOK LOSES JOB UNDER "NO GAYS" POLICY

SUMMARY

Cheryl Summerville worked as a cook at a Cracker Barrel restaurant in an Atlanta suburb for three years. In 1991, the company instituted a sweeping anti-gay policy that officials used to force at least a dozen employees from their jobs—including Summerville.

FACTS

Cheryl Summerville was an extremely reliable and well-liked cook at a Cracker Barrel restaurant in a suburb of Atlanta. She enjoyed her job and had just purchased a new home with her companion, where they lived with Cheryl's son. In 1991, the company adopted a policy refusing to employ anyone "whose sexual preferences fail to demonstrate normal heterosexual values."

Soon after Cracker Barrel issued its new policy, Summerville learned that management had fired certain gay employees. She asked her manager to explain the new policy and then told her manager she was a lesbian. Her manager was very reluctant to fire such a good worker but, under pressure from the district manager, did so. Summerville's official separation notice reads: "This employee is being terminated due to violation of company policy. The employee is gay."

Following negative publicity and picketing by civil rights groups at some of its locations, Cracker Barrel rescinded its official policy, but has not rehired the employees it fired. Some of those employees have suffered dire financial consequences.



JUDY ROHFF

MISSISSIPPI SOCIAL WORKER LOSES JOB OVER FAMILY PHOTO

SUMMARY

Jesse Shaw was working in 1993 as a social worker in Whitfield, at a center for children with mental retardation. One day, at a coworker's urging, Shaw brought in photos of herself, her female partner, and their two dogs; she showed the photos only to coworkers who asked to see them. But while she was away from her desk, another coworker looked at her photos and then complained to management. Ten days later, Shaw was fired. The man who fired her praised her work, but explained that he was firing her "not because you're gay, but because you brought in pictures of your lover."

FACTS

Valarie ("Jesse") Shaw worked as a social worker at Hudspeth Retardation Center, a state-funded center for retarded children near Jackson, Mississippi. When she interviewed for the job, the interviewer told her, "We will not tolerate discrimination based on race, sex, or sexual orientation." Thus assured, Jesse, an African-American, told him she was a lesbian. Two days later, she got the job.

Shaw had a good background for her job at Hudspeth, having studied psychology in college and cared for sick, abused, and neglected children at the Children's Bureau in Los Angeles. But Shaw's companion missed her family in the South. So they moved to Mississippi, where, as Shaw puts it, "your family is everything."

Nearly every day at Hudspeth her coworkers shared pictures of their families. Shaw did not attempt to deny being a lesbian, and one day a coworker asked to see a picture of Shaw's companion. So she brought in photos of herself, her partner, and their two dogs.

Shaw showed the photos only to coworkers who asked to see them, and closed the photo album when she left her desk. But when Shaw was away, some of her coworkers came by and looked in the album. One coworker complained to management about the photos.

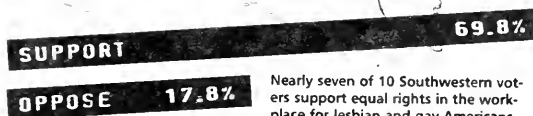
Ten days later, a supervisor called Shaw into his office. Even though he praised her work—she was one of the best employees they had, and they'd heard only positive things about her—he fired her. "Not because you're gay," he said, "but because you brought in pictures of your lover."

Shaw now works in a temporary job as a long-distance operator. She misses social work, the work she feels she was meant to do. She has learned that, when she talks about her family at work, she must avoid saying anything that might reveal her companion's gender.

"Lesbian and gay people are a permanent part of the American workforce, who currently have no protection from the arbitrary abuse of their rights on the job. For too long, our nation has tolerated the insidious form of discrimination against this group of Americans, who have worked as hard as any group, paid their taxes like everyone else, and yet have been denied equal protection under the law."

Mrs. Coretta Scott King

THE SOUTHWEST



Nearly seven of 10 Southwestern voters support equal rights in the workplace for lesbian and gay Americans.

From a poll conducted Nov. 8 and 9, 1994, by the independent firm of Mellman Lazarus Lake, Inc., of voters in Arizona, Colorado, New Mexico, Oklahoma, Texas and Utah.

T H E S O U T H W E S T

JUDGE UPHOLDS DISMISSAL OF ARIZONA SALESMAN FOR BEING GAY

SUMMARY

Jeffery Blain worked in sales for Golden State Container, a Phoenix-area manufacturer. During the first six months of 1993, Blain reportedly received a 37.5 percent raise. But according to Blain, the company fired him a few months later, explaining only that Blain was "a fish out of water." Blain took Golden State to court, alleging that the company had fired him for being gay. But the judge instructed the jury that "an employee is not wrongfully terminated if he is fired for being homosexual." Blain lost his case.

FACTS

Jeffery Blain started work in January, 1993 at Golden State Container, a Phoenix-area manufacturer. Blain quickly established himself as a highly valued employee, reportedly receiving an unprecedented 37.5 percent raise in June. In July, in recognition of his early success, Golden State transferred Blain to a new division of the company to assist in sales. But, Blain reports that the manager of the new division expressed hostility towards him and encouraged speculation that Blain was gay. Blain complained to Golden State's vice president. According to Blain, the vice president fired him soon afterwards, explaining only that Blain was "a fish out of water."

Blain took Golden State to court, alleging that Golden State had fired him for being gay. But the judge instructed the jury that, even if Golden State had fired Blain just because of his sexual orientation, "an employee is not wrongfully terminated if he is fired for being homosexual." Blain lost his case.

Phoenix Gazette

Gay workers face ax—and it's legal

State among 42 where it occurs

You make lots of money for your company. You are efficient. You have a record of excellent record of

T H E S O U T H W E S T

WELL-LIKED SCHOOL RESOURCE OFFICER DEMOTED TO DENVER STREET PATROL

SUMMARY

Angela Romero, a veteran of the Denver Police Department, worked in the department's School Resource Program instructing local public school students about public safety. Although Romero consistently received outstanding reviews from all of the schools where she taught, and had recently earned a promotion, her supervisors in 1986 told her they had unspecified "damaging information" about her and transferred her to street patrol. On street patrol, she often found her calls for backup unanswered. Fellow officers frequently made disparaging comments about lesbians. Eventually, she learned that the "damaging information" was the fact that she is a lesbian.

FACTS

Angela Romero had a long and distinguished record of reliable service with the Denver Police Department. As a member of the department's School Resource Program, she gave lessons to local public school students about public safety. Romero consistently received outstanding reviews from all of the schools where she taught, and earned a promotion. Romero never discussed being a lesbian with any of her fellow police officers.

One day, in 1986, Romero bought a few books in a lesbian bookstore. Soon afterwards, and without warning, her supervisors transferred her to street patrol. They told her only that they had "damaging information" about her that could impair her integrity on the job. Although they refused to specify the nature of the "damaging information," Romero soon found out.

During roll call, other police officers would make disparaging comments about lesbians. While on street-patrol duty, Romero would often find that her calls for backup went unanswered, leaving her in serious danger with no option but to retreat. Romero reported these incidents to her supervisors; they responded by stationing unmarked police cars at her home and even at the homes of friends she visited. Romero then consulted outside agencies. An Equal Employment Opportunity specialist advised her that the law gave little protection against harassment based on sexual orientation. The local American Civil Liberties Union would not take her case.

Romero spent more than four years struggling to keep her job and to withstand the insults and the constant surveillance. Finally, in 1990, Denver enacted an anti-discrimination ordinance, and the police department approved new anti-discrimination and anti-harassment guidelines. Today, Romero is a successful police officer at the Denver Police Department.

T H E S O U T H W E S T

UTAH RESTAURANT MANAGER FIRES GAY AND LESBIAN EMPLOYEES

SUMMARY

Tracie Cleverly, a lesbian, worked at a Salt Lake City franchise of a national restaurant chain, where she received positive evaluations and a promotion. She got along well with her coworkers and manager, who knew she was a lesbian. But when the restaurant hired a new manager, he announced, "I don't want those kinds of people working here." Within weeks he had fired Cleverly and other lesbian and gay employees.

FACTS

Tracie Cleverly, a lesbian, started work in May, 1993 at a Salt Lake City franchise of a well-known national restaurant chain. Cleverly's coworkers and manager knew she was a lesbian and didn't care: she did good work, and her written evaluations included such phrases as "hard worker" and "good leadership skills." By December, the restaurant manager had made her a crew trainer and started her in training to be a supervisor.

Then the manager resigned, and the restaurant hired a new manager. According to the restaurant's assistant managers, when the new manager started, he already had a list of people he planned to fire. Cleverly's name, and those of other gay and lesbian employees, headed the list. "I don't want those kinds of people working here," he told his assistant managers.

In January, 1994, the new manager fired his gay and lesbian employees, including Cleverly. After he fired these employees, he instructed the remaining employees to refuse to serve them even as customers. When an employee from another restaurant asked an assistant manager why the manager had fired these employees, she explained, "Because they were gay."

It took Cleverly three months to find new employment. During that time, she became homeless and was forced to go on welfare and to accept food stamps. As a result, many of the restaurant's customers took their business elsewhere.

"And now the proposed Employment Non-Discrimination Act ... corrects the injustice of qualified workers being denied jobs and promotions or being fired because of their sexual orientation."

The Arizona Republic

THE WEST



More than seven of 10 Western voters support equal rights in the workplace for lesbian and gay Americans.

From a poll conducted Nov. 8 and 9, 1994, by the independent firm of Mellman Lazarus Lake, Inc., of voters in Alaska, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington and Wyoming.

T H E W E S T

CALIFORNIA NEWSPAPER EMPLOYEE VICIOUSLY HARASSED AT WORK

SUMMARY

Peter Eliason, an employee of the circulation department at a California newspaper, has suffered ongoing and severe harassment, including anti-gay jokes, threats and acts of vandalism. Eliason has found sexually explicit cartoons slipped under his office door, a condom placed in his in-box, and the epithet "FAGGOT" etched on his name plate. Despite his request for assistance, management has refused to address the problem.

FACTS

Peter Eliason, an employee in the circulation department of a daily California newspaper, has suffered continuous on-the-job harassment because he is gay.

Beginning in 1989, Eliason's coworkers instigated rumors that Eliason was gay. On separate occasions, Eliason discovered an AIDS pamphlet slipped under his office door, a condom placed in his in-box, and a sexually explicit cartoon slipped under his door.

Eliason was subjected to his coworkers' anti-gay remarks, including his supervisor's anti-gay jokes insinuating that two gay men with whom the newspaper conducted business — to whom his supervisor referred as "faggots" — were engaged in sexual relations. Eliason's name plate was etched with the epithet "FAGGOT." A district manager threatened to vandalize Eliason's automobile in a similar manner.

Although management had remedied racial harassment of a similar nature, Eliason's situation was not addressed. Faced with management's inadequate response, Eliason contacted the parent company of the newspaper. The assistant circulation director stated that Eliason was angering "some very important people," and asked Eliason to repudiate his communications with the newspaper's parent company, which is a very well-known communications conglomerate. When Eliason refused, he was denied two promotions, in spite of his exemplary record. Eliason inexplicably received less-than-satisfactory performance evaluations which were inconsistent with his history of achievement awards.



Eliason's vandalized name plate.

T H E W E E K L Y

CALIFORNIA RESTAURANT EMPLOYEES HARASSED AND FIRED

SUMMARY

William Ballou worked in 1992 as assistant manager of a restaurant in Fremont. The restaurant manager would urge servers to rush gay customers, and he once said of a server, "the next time the faggot screws up, we'll have to dump him." During an argument, the manager called Ballou "nothing but a faggot bitch." Soon thereafter, the restaurant's owners fired Ballou, citing "personality conflicts that can't be taken care of."

FACTS

William Ballou began working as a waiter at a restaurant in Fremont in September, 1991. Within six months, he had received both a promotion to assistant manager and a glowing letter of recommendation by the franchise owners.

But waiters, bartenders, and even the restaurant manager frequently made anti-gay remarks, some aimed at employees and some aimed at customers. For instance, the manager would urge servers to rush gay customers, saying, "it's a family restaurant." On another occasion, the manager derided another employee, saying that "the next time the faggot screws up, we'll have to dump him."

One day, the manager called Ballou "nothing but a faggot bitch." Ballou informed the restaurant owners of the confrontation, but they fired Ballou, citing "personality conflicts that can't be taken care of."

SUMMARY

Xavier David Caylor waited tables at a San Diego franchise of a national restaurant chain. His district manager told another employee she had a problem with gay people. When Caylor applied for management training, the district manager rejected his application. Later, while Caylor waited tables at another franchise of the same chain, coworkers repeatedly verbally harassed him until he left in 1991.

FACTS

During 1986 and 1987, Xavier David Caylor waited tables at a San Diego franchise of a national restaurant chain. After about a year, he applied to enter management. But the district manager—who admitted privately that she had a "problem" with gay men—rejected Caylor's application.

At another franchise in the same restaurant chain, Caylor suffered repeated harassment. Cooks and busboys would overheat his plates, lose his pay checks, and make derogatory remarks about him. In 1991, after more than two years of harassment, and with his path to promotion blocked by prejudice, Caylor left his job.

"But nearly everyone, save the most extreme bigots, can agree that no one should be denied employment or promotions because of sexual orientations."

The Los Angeles Times

T H E W E S T

L.A. POSTAL WORKER ATTACKED AND HARASSED ON THE JOB

SUMMARY

Kenneth Wilson has worked for the U.S. Postal Service in Los Angeles for 20 years. Since 1989, Wilson's coworkers have repeatedly harassed him for being gay: they have pushed him, thrown mail at him, slammed mail trays behind him, told jokes about AIDS, and cursed him to his face, usually using the word "faggot." His supervisors have failed to take effective measures to stop the harassment. Because federal law does not prohibit anti-gay discrimination, yet does prevent California from applying its discrimination law to federal instrumentalities such as the post office, no law protects Kenneth Wilson.

FACTS

Kenneth Wilson has worked for the United States Postal Service in Los Angeles since 1974, for most of those years as a letter carrier. During his time at the post office he has won many awards, including, in 1992, a safety award for his driving record.

Because Wilson never dated women, coworkers realized he was gay. In 1989 several coworkers began harassing him. They would throw mail at him, slam mail trays behind him, tell jokes about AIDS, and curse Wilson to his face, usually including the word "faggot." After two years of constant harassment, in July, 1991, under instructions from a therapist, Wilson left work.

In January, 1992, after his supervisors and the harassing coworkers signed an agreement to stop the harassment, Wilson returned to work. Within weeks, one of the harassers who had signed the agreement came up behind Wilson at work and pushed him. When Wilson reported the incident, his supervisors locked him in a room and interrogated him for several hours about his own personal history.

Finally, Wilson met with the assistant postmaster for Los Angeles County. After listening to Wilson, the assistant postmaster dismissed Wilson's appeal and accused Wilson of having invented the harassment to get the sexual attention of his male coworkers.

"When I learned that in 42 states it is still legal to fire someone because they are gay or lesbian, I was frankly shocked."

Steven Coulter, Vice President, Pacific Bell

T H E W E E S T

HIGHLY PRAISED EMPLOYEE FIRED FROM IDAHO FUNERAL HOME

SUMMARY

Todd Goodsell worked for a funeral home in Mountain Home for three years. He received repeated praise from customers and nothing but positive job evaluations from the owners of the business. But as soon as the owners learned Goodsell was gay, they fired him.

FACTS

In March, 1991, a funeral home in Boise hired Todd Goodsell to open a new funeral home in the city of Mountain Home. From the beginning and for many months afterwards, the new location had only one employee, Goodsell. Nevertheless, in just three years the new Mountain Home funeral home had acquired a 65% local market share.

Then, in May, 1994, someone called the funeral home and spoke to Goodsell's secretary. The caller said she knew that Goodsell was gay, and that she would never use a funeral home that employed a gay person. She asked to speak to the manager. Upon learning that Goodsell was the manager, the caller asked for the telephone number of the main office in Boise, and hung up. Goodsell learned about the conversation from his secretary and immediately scheduled a meeting with the owners, who were out of town.

When Goodsell arrived for the meeting, the owners told him that they had consulted their attorney and, without giving Goodsell a chance to discuss the matter, fired him. The owners refused to give Goodsell a job reference and have told others in the industry that Goodsell was gay. Goodsell has children in Idaho and does not want to leave the state, but he has been unable to find a job since May.

SPOKESMAN REVIEW

Homosexuals don't have legal job protection

By Susan Drumbheller
Staff writer

COEUR D'ALENE — Gays and lesbians have no job protection under Idaho law, and their vulnerability would be guaranteed if the Idaho Citizens Alliance anti-gay-rights initiative becomes law.

In November, voters will decide the fate of Proposition 1, a seven-part act that addresses homosexual rights in Idaho.

Perhaps the most confusing measure is the one dealing

It re...

T H E W E S T

OREGON WORKERS DENIED PROMOTIONS AND DISMISSED

SUMMARY

As a department manager for a national upscale department store in Portland, Janice Grounds received large bonuses and a prize for customer service. But when it became known around the company that she was a lesbian, Grounds found her path to promotion blocked and saw jobs she applied for given to applicants with much less experience and much lower sales records.

FACTS

Janice Grounds began working for a national upscale department store in Portland in 1984 as manager of the accessories department. Over the next nine years, she won prizes for customer service, received large bonuses, and earned promotions to progressively larger departments. By 1990, she had become manager of the second largest department in the entire 52-store chain, overseeing 100 employees and an \$8 million budget.

Rumors circulated that Grounds was a lesbian soon after she started working at the store. Often coworkers would ask Grounds, "You're a lesbian, aren't you?"—a question she refused to answer. Company executives would frequently make anti-gay remarks in Grounds's presence.

In 1990, Grounds applied for the position of buyer, a key job that the company considers a prerequisite for promotion to the next rung of corporate management. In the next three years, Grounds applied for 23 different openings for this position. The company turned her down each time, instead offering the job to applicants with less experience and lower sales records.

SUMMARY

Phil Matthews worked at a pest control service in Salem in 1992. After only two months, he had achieved the second highest sales record for the entire Oregon and Washington market. Nevertheless, when one of the owners learned that Matthews was gay, he fired Matthews, saying that "that kind will not work for me."

FACTS

Phil Matthews began working at a pest control agency in Salem in November, 1992. After only two months, he had achieved the second highest sales record for the entire Oregon and Washington market.

One day, soon after starting work at a new location, Matthews forgot to remove an earring when he went to work. Matthews's new manager spotted the earring and immediately asked if Matthews was gay. Matthews answered truthfully. When the manager relayed Matthews's answer to the company's owners, one of them shouted: "That kind will not work for me." Matthews was then fired.

T H E W E S T

PACIFIC NORTHWEST WORKERS DEMOTED AND FIRED

FACTS

Bonita Corliss of Seattle was recruited by a state agency in 1987 for a position in the library at the state women's prison. After a few interviews, during one of which the interviewer warned her not to identify as a lesbian to the head of the prison, Corliss got the job. She began work in early June 1987.

Soon afterwards, the harassment started. One day, arriving for work, she discovered that someone had taken all the gay and lesbian books off the shelves and stacked them on her desk. Later, the deputy superintendent called her into the superintendent's office and demanded to know if she was a lesbian.

Corliss faced particular anti-gay harassment from a gang of inmates who openly identified with the Ku Klux Klan. Although she sought help from her supervisors, they left her to fend for herself against the gang.

Finally, prison officials gave Corliss a letter stating that she had become "a threat to the security of the institution." Eleven weeks after Corliss began her job, a prison administrator met her, ordered her to surrender her identification, escorted her to pack her personal possessions, and rushed her off the premises.

FACTS

Over several years of reporting on education issues at a Tacoma newspaper, Sandy Nelson received several journalistic awards, positive reviews, and pay raises. In 1986, however, another company purchased the newspaper and abrogated union contracts, including a clause that protected employees from retribution based on their off-duty activities.

In 1989, Tacoma enacted an anti-discrimination ordinance. Immediately, a local group launched a campaign to overturn the ordinance and re-legalize discrimination against gay people. As a citizen, Nelson worked during her off-hours to retain the ordinance. But the effort failed, and anti-gay job discrimination was once again legal in Tacoma.

After company managers learned of Nelson's involvement in the campaign, they reprimanded her and transferred her to the night copy desk. At the same time, the company neither reprimanded nor interfered with other reporters who were politically active in other causes off the job. Indeed, even when Nelson herself worked on other causes, the newspaper left her alone.

In 1994, it happened again. On her own time, Nelson testified in favor of a state anti-discrimination bill. Once again, the newspaper reprimanded her, this time threatening her with further unspecified "administrative action." The newspaper has not objected to other types of political activity in the four years since Nelson's reassignment in 1990.


THE SOLUTION... FAIRNESS

The Employment Non-Discrimination Act (ENDA) and Workplace Non-Discrimination Policies

Currently, there is no federal law against the kind of discrimination detailed in the cases published here. Qualified, hardworking people who are denied work, fired or otherwise treated unfairly merely for being lesbian or gay have no basic protection under the civil rights laws of the United States. A patchwork of protection exists in several states, and an estimated 130 municipalities have laws and policies against anti-gay discrimination.

More than half of the Fortune 1000 companies protect their lesbian and gay employees in written policies that prohibit discrimination in employment practices. The White House, federal agencies and a majority of Senate and House offices have voluntarily instituted similar policies. A rapidly growing number of businesses and public employers have found that fairness and equality in the workplace enhance productivity and increase profitability.

Only a federal law would create a level playing field. The Leadership Conference on Civil Rights has proposed the Employment Non-Discrimination Act (ENDA) to ensure that all Americans have equal rights in the job market and workplace. To find out more about ENDA and workplace non-discrimination policies contact the Human Rights Campaign Fund.


STATE OF NEW JERSEY
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CAMPAIGN FUND

CHRISTINE TODD WHITMAN
Sponsor

Currently, under federal law discrimination on the basis of a person's sexual orientation is legal. I am pleased that New Jersey already has laws protecting its gay and lesbian community against discrimination. Discrimination against gays has an adverse effect on productivity and morale in the workplace. It states that do not have laws prohibiting discrimination based on sexual orientation, members of the gay and lesbian community can be fired, demoted, lose job opportunities and employment benefits based on factors completely unrelated to their capabilities, experience or work performance.

Signature: CH. TODD WHITMAN Date: 8/17/94
Christine Todd Whitman

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Statement of

Charles K. Gifford
Chairman & CEO
Bank of Boston

Hearing on the

Employment Non-Discrimination Act

before the

U.S. House of Representatives
Committee on Small Business
Subcommittee on Government Programs

July 17, 1996

Washington, D.C.

On behalf of my colleagues at Bank of Boston, I am pleased to submit this statement in support of the Employment Non-Discrimination Act (ENDA). I commend Chairman Torkildsen for calling this hearing to shed light on this historic legislation. Just as the Civil Rights Act of 1963 established a law barring discrimination on the basis of race, and subsequent laws have prohibited discrimination because of age and gender, it is time to outlaw discrimination on the basis of sexual orientation.

Bank of Boston opposes all forms of discrimination, including that based on sexual orientation. We believe, simply, that discrimination is wrong and not in anyone's best interest.

As a corporation with more than 18,000 employees, we've already adopted and live by the spirit of ENDA. We now ask the business community to follow our lead, so that employees everywhere will be assured of working in an environment that is fair and equitable. We also want employees to have a mechanism through which to speak up if they do feel they are being treated unfairly.

In addition, there are compelling business reasons why we support ENDA and the work force diversity it will engender. We want to see ENDA approved because we believe it will help us as we advance a competitive business strategy that not only embraces diversity, but also depends on it:

- In a global economy, we must recruit and retain the best talent and create an environment in which everyone can excel.
- In the communities we serve, we must reflect our customer base - including gays and lesbians.
- In a service economy, we must strengthen the critical link between employee satisfaction and customer satisfaction.
- In a competitive industry, we must align with our corporate customers, many of whom have already endorsed ENDA.

To this last point, let me add that supporting ENDA is not only the right thing to do, it is the smart thing to do, and we are hardly alone in this thinking. In fact, in preparing for this statement, the Human Rights Campaign Fund provided a list of some 27 corporations that have publicly endorsed ENDA. We are delighted that 25 of these companies are customers of Bank of Boston. Clearly all these companies, like us, realize the benefits to productivity of creating an environment where employees are free to focus their energy on exceeding the expectations of their customers, instead of worrying about losing ground for being lesbian or gay.

When Bank of Boston identified its core values recently, the decision to include diversity was clear. When our gay and lesbian employees met four years ago to form a support group, supporting their efforts was easy. With both those actions, we sent a strong message to our stakeholders that we value all our employees. As a result, we believe we are a stronger employer.

It is clear to Bank of Boston that an effective non-discrimination policy with regard to sexual orientation is key to our commitment to diversity. It makes good business sense, it makes companies stronger and it makes good public policy.

I therefore urge swift enactment of the Employment Non-Discrimination Act.



WASHINGTON NATIONAL OFFICE
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 Director

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American Civil Liberties Union



Testimony On the Employment Non-Discrimination Act -- H.R. 1863

Submitted to the Subcommittee on Government Programs of the House Committee on Small Business

July 31, 1996

Nadine Strossen *President*
Ira Glasser *Executive Director*
National Headquarters 132 West 43rd Street New York, N.Y. 10036

Kenneth B. Clark *Chair, National Advisory Council*

Richard Zacks *Treasurer*
 (212) 944 9800  

INTRODUCTION

The American Civil Liberties Union is a nationwide, nonpartisan organization dedicated to defending the principles embodied in the Constitution and the Bill of Rights. The organization began in 1920 and today is 270,000 members strong.

The American Civil Liberties Union supports the Employment Non-Discrimination Act (ENDA). We believe that in America, no one should be denied the opportunity to work and to advance in their career, solely on the basis of sexual orientation. We have struggled as a society over the last 50 years to eliminate those instances when some Americans are denied employment, housing, and service for reasons that are arbitrary and unfair, like race, religion and gender. When that happens, our response has been to pass laws aimed at making sure that discriminatory considerations do not govern access to employment, housing and public accommodations. These laws, we believe, are an essential component of making the 14th Amendment's promise of equal protection of the law real.

The time has come for America to recognize that lesbians, gay men and bisexuals should be protected from discrimination in the workplace, in housing and in public accommodations. ENDA is an important, but in some ways modest step in that direction. Congress should pass it without delay.

THE CASE FOR CIVIL RIGHTS PROTECTION

Although all arbitrary discrimination is wrong, workplace discrimination is especially egregious. In most circumstances in America today, employment is essential to any kind of a decent life, and it can be essential to survival. To deprive anyone of employment is to deprive them of sustenance.

Congress knows how pervasive employment discrimination against gays and lesbians has been and is.¹ And case studies about how many gay men and lesbians have lost or been denied jobs or promotions vastly understate the problem. The threat of discrimination is a very real presence in most American workplaces.² For example, a 1987 Wall Street Journal poll of Fortune 500 executives showed 66% would hesitate to give a management job to a lesbian or a gay man. Most gay men and lesbians attempt to protect themselves against the threat of discrimination by hiding their identity. But hiding one's identity is no simple task. It requires carefully policing even the most casual conversations, and banishing almost any

¹ See Testimony of Chai R. Feldblum in Support of H.R. 1863, Committee on Small Business, Subcommittee on Government Programs, July 17, 1996, Appendices I, II and III.

² See Hearings on S. 2238 Before the Senate Committee on Labor and Human Resources, 103rd Cong. 2nd Sess. 70 (1994).

acknowledgment of family and friends from the workplace (those who doubt it should try to see how far they can get through a single day without referring to a spouse or companion). In addition to being difficult to do, hiding one's identity is harmful; it hurts the workplace, building walls between co-workers and it can impose a terrible psychological toll on those forced to do the hiding.³

It also appears from the best evidence available today that employment discrimination takes a toll at the most basic level: income. Although opponents of civil rights claim that lesbians and gay men are well heeled, the only thing close to a representative survey suggests that lesbians and gay men generally earn less than their heterosexual counterparts.⁴

And it is plain today beyond any doubt that discrimination against lesbians and gay men in the workplace is arbitrary. Claims that lesbians and gay men are mentally ill, or that they harm the efficiency of the workplace have been shown up as baseless myths.⁵ And as Congress discovered just two years ago, the evidence is now overwhelming that even in the context of the military, lesbians and gay men are every bit as capable as heterosexuals.⁶

Finally, popular belief to the contrary, lesbians and gay men are not protected by civil rights laws in most of the United States. Only nine states comprehensively prohibit employment discrimination.⁷ Courts have consistently ruled that sexual orientation is not covered under Title VII of the 1964 Civil Rights Act.⁸

ENDA: THE RESPONSE

Attached to this testimony is a section by section analysis explaining just what each part of ENDA will do. In brief, ENDA would ban discrimination based on sexual orientation

³ Herek, *Myths About Sexual Orientation, A Lawyers Guide to Social Science Research, Law and Sexuality*, vol. 1, pp.146-147 (1991).

⁴ Yankelovich Monitor: *Gay/Lesbian Report, Demographic Profile*, June 9, 1994.

⁵ *Id* at pp. 138-143; 169-172.

⁶ Senate Armed Services Committee Hearing, April 29, 1993.

⁷ The states which have comprehensive laws are California, Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, Rhode Island, Vermont, and Wisconsin (9). The District of Columbia also has a comprehensive law. Colorado, Louisiana, Maryland, New Mexico, New York, Ohio, Pennsylvania, and Washington (8) have executive orders which prohibit some employment discrimination by state government. Illinois and Michigan have state civil service rules which do the same thing.

⁸ *See* *Dillon v. Frank*, 952 F. 2d 403 (6th Cir. 1992). *See* *DeSantis v. Pacific Tel. and Tel. Co.*, (9th Cir. 1979).

in all aspects of employment, including hiring, firing, promotion, compensation, and most terms and conditions of employment. Sexual orientation could no longer be a basis for employment decisions. ENDA's ban on discrimination will protect heterosexuals as well as lesbians and gay men, and it will protect workers who associate with gay and lesbian co-workers. It will also protect workers who support it from retaliation.

But as noted above, ENDA is modest.⁹ It applies only to discrimination in employment, not to housing and public accommodations, and only to employers with 15 or more employees. ENDA explicitly does not require that fringe benefits be provided to the partners of lesbian and gay workers. ENDA explicitly forbids the uses of quotas or preferential treatment of any kind, and it explicitly does not permit "disparate impact" claims (see section 4 of the section by section analysis for an explanation of disparate impact and ENDA's ban on such claims). ENDA does not apply to service in the armed forces and it will have no effect on veteran's preference programs. ENDA does not apply to religious organizations except to the extent that they engage in commercial businesses so divorced from their religious functions that they are subject to federal income taxes. The exemption explicitly includes religious schools and hospitals.

In its basic structure, ENDA parallels Title VII of the 1964 Civil Rights Act, the law which prohibits employment discrimination based on race, religion and gender. It provides exactly the same procedures and remedies that Title VII provides.

THERE ARE NO CONVINCING ARGUMENTS AGAINST ENDA

ENDA forbids employment discrimination based on sexual orientation, nothing more and nothing less. As the Supreme Court recently observed in Evans v. Romer, anti-discrimination laws are not "special rights." To most of us, the right to have and keep a job, as the court observed, is taken for granted, either because we are already protected against discrimination or because we do not face discrimination. But to those who do face discrimination, there is nothing "special" about a law aimed at preserving your ability to work--the most essential aspect of ordinary day to day life in America. See, Evans v. Romer U.S. (May 20, 1996).

The claim that lesbians and gay men as a group represent a threat to children is untrue, as is the claim that lesbians and gay men have negative effects on children when they are parents or function as role models, and those who make those arguments have no respectable

⁹ The ACLU believes that ENDA is a bit too modest. We think, for example, that the religious exemption in ENDA should be no broader than the parallel exemption contained in Title VII of the 1964 Civil Rights Act (42 U.S.C. §2000e) and that the partners of lesbians and gay men should receive equal treatment. However, we support ENDA because we believe the basic civil rights protection which it does afford is crucial now.

scientific support whatsoever.⁹

Finally, the argument that we should deny civil rights protection to lesbians and gay men to discourage people from being gay is ridiculous. Whatever the sources of sexual orientation may be, it is very clear that is not a casual choice, subject to simple change in the face of government incentive.¹¹ More important, in workplace terms there simply is nothing wrong with being gay. Lesbians and gay men are capable, neither better nor worse as employees. In a pluralistic society in which work is essential to survival, we can not allow one person's opinions of about the worth, job performance aside, of another to determine if that other person is able to work. Perhaps even more important, in that kind of pluralistic society, we should not use discrimination in the workplace to try to change the most fundamental aspects of people's lives. That is why we ban discrimination based on religion, and why we ban most forms of marital status discrimination as well.

ENDA ENJOYS BROAD SUPPORT

ENDA enjoys broad-based support. Poll after poll has shown that the majority of Americans feel that gays and lesbians should have protection from employment discrimination. A recent Newsweek poll showed that 84% of the American public supports ending workplace discrimination against gay men and lesbians. ENDA has been endorsed by the Leadership Conference on Civil Rights and is one of LCCR's legislative priorities for the 104th Congress. In addition, major corporations -- AT&T, Eastman Kodak, Microsoft, RJR Nabisco, Quaker Oats, and Xerox -- specifically endorse ENDA¹². Numerous religious groups also support ENDA: National Council of Churches, National Catholic Conference for Interracial Justice, Southern Christian Leadership Conference, and the Union of American Hebrew Congregations.

CONCLUSION

At one time, most of America accepted employment discrimination based on race and gender. As we evolved as a society, we came to view discrimination as fundamentally at odds with the basic values we hold as a society and our basic commitment to equality. Similarly, it is plain that in the not too distant future, we will look back with shame and embarrassment at an era in which discrimination against lesbians, gay men and bisexuals was. Leaders should lead. It is time for Congress to begin the process of putting an end to discrimination based on sexual orientation.

⁹ Herek, Myths About Sexual Orientation, A Lawyers Guide to Social Science Research, Law and Sexuality, vol. 1, pp.152-161 (1991).

¹⁰ Id. at 148-152.

¹¹ Memorandum from Human Rights Campaign, Workplace Project: Corporations Endorsing ENDA.

ENDA- Section by Section Analysis

Section 1. SHORT TITLE

This is the law's "popular name."

Section 2. DISCRIMINATION COVERED.

This is the heart of ENDA. It says that no one can be discriminated against because of sexual orientation.

Subsection (1) is the basic rule: no different treatment because of sexual orientation.

Subsection (2) makes it clear that a person can't be discriminated against because of the sexual orientation of people she or he associates with. Thus, for example, you can't discriminate against someone because he or she socializes or lives with a heterosexual.

Subsection (3) is a catchall; it is designed to make sure that all forms of employment discrimination are covered, and that artful attempts to evade the law do not succeed. So, for example, a policy of assigning all lesbian and gay employees into a "separate but equal" job unit would not be allowed.

Section 3. BENEFITS.

ENDA has nothing to say about providing benefits to the partners of employees. It neither requires nor forbids "domestic partnership" plans which do that.

Section 4. NO DISPARATE IMPACT.

Disparate impact claims cannot be made under ENDA. (The cross reference is to Title VII of the 1964 Civil Rights Act. Title VII is the part of that law which prohibits employment discrimination based on race, religion, gender, and national origin). Under Title VII, an employment policy has a "disparate impact" if, even though its terms do not discriminate and there is no proof that it was intended to discriminate, it has the effect of excluding or disadvantaging a disproportionately large number of people in a protected group. For example, a limit on how much an employee can weigh might disadvantage far more men than women. Policies which have a disproportionate impact, although illegal in some circumstances under Title VII are not illegal under ENDA.

Section 5. QUOTAS AND PREFERENTIAL TREATMENT PROHIBITED.

ENDA forbids the use of quotas and preferential treatment of any kind. The 1964 Civil Rights Act, by comparison, allows (although it does not require) some types of preferential

treatment.

Section 6. RELIGIOUS EXEMPTION

ENDA does not apply at all to religious organizations, except to the limited extent that they run commercial businesses so divorced from any religious mission that they are subject to federal income tax. Section 17, subsection (8) defines a religious organization as a religious corporation, association, or society. It explicitly includes schools and institutions of higher learning if they are owned or run by a religious organization, or if the curriculum is directed at propagation of a faith. Title VII of the 1964 Civil Rights Act provides a much more limited exemption which allows religious organizations to discriminate in favor of persons of a particular religion. The free exercise clause of the Constitution also provides a much more limited exception for ecclesiastical jobs.

Section 7. NON-APPLICATION TO MEMBERS OF THE ARMED FORCES; VETERAN'S PREFERENCES.

Subsection (a) says ENDA does not apply to military policies about members of the service. Thus, it will have no effect on "don't ask, don't tell."

Subsection (b) says ENDA will have no effect on state, federal or local laws which give special preferences to veterans, even though since the armed forces discriminate against lesbians, gay men and bisexuals, those preference programs discriminate as well.

Section 8. ENFORCEMENT.

Subsection (a) (1-4) gives the Equal Employment Opportunity Commission (EEOC), the Library of Congress and the Attorney General the same power to enforce ENDA which they have under Title VII of the Civil Rights Act, the Government Employee Rights Act, and the Congressional Accountability Act. Under these Acts, in the case of private employers and most state government employers, the EEOC generally has the power to investigate complaints, and if there is reasonable cause to believe a violation has occurred, to attempt to get the parties to agree to a resolution.

If the EEOC cannot get a satisfactory compliance agreement, it may bring suit unless the person accused of discriminating is a state or local government agency, in which case it can send the case to the Attorney General, who can bring suit. If the Commission neither obtains an acceptable compliance agreement against nor brings suit, the individual who filed the complaint may sue.

The Civil Service Commission enforces the law for most Federal employees. In addition to the power to investigate, it has the power to decide if a violation occurred and to provide remedies. In the case of some policy making state and Federal employees, the EEOC has the power to decide if a violation occurred, and, if it did, to award remedies.

The Attorney General also has the authority to bring suit against anyone believed to be

engaged in a pattern or practice of discrimination.

Subsection (a) (5) gives federal courts the same jurisdiction over ENDA claims which they have under Title VII, the Government Employee Rights Act and the Congressional Accountability Act. Under these acts, generally speaking, U.S. District Courts have jurisdiction to hear any claims of discrimination arising under the law. Policy level Federal employees can have the EEOC's decision reviewed by the Court of Appeals for the Federal Circuit. Policy level state employees can have the EEOC's decision reviewed by the U.S. Appeals Court in their Circuit.

Subsection (b) says that the remedies available under ENDA are the same remedies available under Title VII of the Civil Rights Act, the Government Employee Rights Act, and the Congressional Accountability Act. Those remedies generally include reinstatement, hiring, back pay and some compensatory damages

Subsection (c) applies the Congressional Accountability Act to Congressional employees who make claims under ENDA.

Section 9. STATE OR FEDERAL IMMUNITY.

The provisions of this section are the same as those found in parallel provisions of Title VII of the 1964 Civil Rights Act.

Subsection (a) waives the immunity from being sued which states have under the 11th Amendment. Congress has the power to waive this immunity under the 14th Amendment. The waiver is total; states are subject to all the same liabilities which private parties are subject to.

Subsection (b) waives the sovereign immunity of the United States. Under this court created doctrine, the federal government can not be sued unless it consents. Under this section, the United States does not consent to liability for punitive damages, but it does consent to all other liability, explicitly including liability for interest.

Section 10. ATTORNEY'S FEES.

This section gives both courts and the EEOC the power to order the losing party in a dispute to pay the winner's lawyer's fees, expert fees, and court costs. The federal government, however, may not recover fees if it is a winner, but it may be forced to pay them if it loses. (This provision is virtually identical to the corresponding section of Title VII of the 1964 Civil Rights Act).

Section 11. RETALIATION AND COERCION PROHIBITED.

Subsection (a) says that people can't be discriminated against because they oppose discrimination covered by the Act, make a claim under the Act, or help with a case in any way.

Subsection (b) says that no one can be coerced to give up his or her rights under the Act, or be threatened or intimidated for exercising them or helping someone else to exercise them.

Section 12. POSTING NOTICES.

Under the section, which incorporates the notice section of Title VII of the 1964 Civil Rights Act, employers, employment agencies and labor unions are required to post notices which explain what the law prohibits and how to make a claim

Section 13. REGULATIONS.

This section gives the E.E.O.C. the power to adopt regulations implementing ENDA. The Commission has the same power under Title VII of the 1964 Civil Rights Act

Section 14. RELATIONSHIP TO OTHER LAWS.

This section says that ENDA does not eliminate or limit anyone's right, under any other federal, state or local law on discrimination. In lawyer's jargon, this means ENDA (like Title VII of the 1964 Civil Rights Act) does not "preempt" state and local laws.

Section 15. SEVERABILITY.

Under this section, if a court rules that any part of ENDA, or any specific application of it is invalid, the rest of it remains valid.

Section 16. EFFECTIVE DATE.

ENDA takes effect sixty days after it is signed, and only applies to things which happen after that.

Section 17. DEFINITIONS.

With the few exceptions noted below, ENDA gets its definitions from Title VII of the 1964 Civil Rights Act.

Subsection (2) defines "covered entity", a term used in ENDA as shorthand for the phrase "employer, employment agency, labor organization, joint labor management committee" used in Title VII of the 1964 Civil Rights Act and to include "employing authority," the phrase used in the Government Employee Rights Act and the Congressional Accountability Act to include most state and federal agencies, including Congress.

Subsection (3) defines an **employer** as a business with fifteen or more employees for at least twenty weeks a year.

Subsection (4) defines an **employment agency** as anyone who obtains workers for an employer.

Subsection (5) defines "**employment or employment opportunities**" (terms not defined in Title VII) as virtually any aspect of employment or application for employment.

Subsection (6) defines a "**labor organization**" as any organization of employees set up to deal with grievances or terms and conditions of employment

Subsection (7) defines a "**person**" as a human being, a government, a corporation, trust, association or other legal form for doing business.

Subsection (8) defines a "**religious organization**" (a term not defined in Title VII) to include any kind of religious corporation, association or society. It explicitly includes school and institutions of higher learning if they are owned or run by a religious organization or if the curriculum is directed at propagation of a faith.

Subsection (9) defines "**sexual orientation**" (a term not used in Title VII) to mean heterosexuals, lesbians and gay men, and bisexuals. It explicitly includes both a person's actual sexual orientation, and what someone else might think the person's sexual orientation to be. So if, for example, a heterosexual is fired because her employer mistakenly thinks she is a lesbian, she is protected by the Act.



The American Jewish
Committee

OFFICE OF GOVERNMENT AND INTERNATIONAL AFFAIRS

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July 16, 1996

The Honorable Peter G. Torkildsen
House Committee on Small Business,
Government Programs Subcommittee
B-363 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Torkildsen:

I enclose a letter written on behalf of ten Christian and Jewish religious denominations and human relations organizations endorsing the Employment Non-Discrimination Act as an important effort to protect basic civil rights.

In addition to discussing the need for this legislation, the letter sets forth the fashion in which ENDA gives careful and proper regard to the protection of religious liberty.

We respectfully request that the enclosed letter be made part of the record at tomorrow's hearing of the Government Programs Subcommittee of the House Committee on Small Business. Extra copies are enclosed for members of the Subcommittee and for distribution.

Sincerely,

Richard T. Foltin
Legislative Director and Counsel

Encl.

American Jewish Committee • American Jewish Congress • Anti-Defamation League
 Church of the Brethren • National Council of Churches • National Council of Jewish Women
 Union of American Hebrew Congregations • United Church of Christ
 United Methodist Church • Unitarian Universalist Association

July 16, 1996

The Honorable Peter G. Torkildsen
 House Committee on Small Business,
 Government Programs Subcommittee
 B-363 Rayburn House Office Building
 Washington, D.C. 20515

Dear Chairman Torkildsen:

We write on behalf of religious denominations and human relations organizations representing millions of religious Americans nationwide. Our organizations have endorsed the Employment Non-Discrimination Act (H.R.1863) as an important effort to protect basic civil rights by prohibiting discrimination in the workplace based on sexual orientation.

Although polls report that 75 to 80 percent of the American public favors preventing employment discrimination against gays and lesbians, the reality is that it is still perfectly legal in most jurisdictions in this country to discriminate against gays and lesbians in hiring, firing and promotion decisions for no other reason than their sexual orientation. And, all too often, this type of discrimination does occur. In one disturbing example, Cheryl Summerville, an award-winning cook with an exemplary work record, was dismissed from her position at a restaurant for the explicit reason that "the employee is gay."

ENDA forbids employers with fifteen or more employees from discriminating in employment decisions on the basis of a person's sexual orientation. In so doing, ENDA does not create any "special rights." It simply extends the same legal protections from employment discrimination provided to other individuals who have historically been denied equal employment opportunities. This is simple justice. Employment decisions should be based on one's performance and abilities, not based on perceptions of an employee's sexual orientation.

For all of us the protection of religious liberty is a paramount concern. ENDA gives proper regard to this concern. ENDA broadly exempts from its scope any religious organization, including religious educational institutions. Thus, ENDA will not require sectarian institutions to violate the religious precepts on which they are founded, whether or not we may agree with those precepts.

ENDA sets forth one narrow exception to this broad exemption for religious institutions: an employee of a religious institution who engages entirely in that limited class of for-profit activities subject to unrelated business income tax under existing law will be covered by ENDA's protections. This exception to the exemption is clearly appropriate. A general civil rights bill should not exempt commercial activities, whether carried out by a for-profit business or as a discrete portion of an otherwise religious institution's activities, because those enterprises discriminate for reasons based on religious belief. Nevertheless, it should be noted, this exception to the broad exemption for religious institutions is extremely narrow -- only an

employee who devotes all of his or her time to taxable activities of the religious institution is brought under ENDA.

The question arises as to the impact of ENDA on individuals or for-profit companies that, for reasons grounded in religious belief, would want to discriminate in employment practices on the basis of sexual orientation. We believe that a general civil rights bill should not exempt individuals or companies engaged in commercial enterprises because they desire to discriminate for reasons based in religious belief. There is a substantial difference between a business operating in the arena of commerce and a religious corporation which exists to serve an explicitly religious mission.

In any event, on this last issue, the Religious Freedom Restoration Act protects religiously observant individuals from application of a law that substantially burdens their religious free exercise unless the government can show a compelling interest for such application that cannot be satisfied by more narrowly tailored means. The courts will no doubt be asked in specific cases to determine whether particular religiously observant individuals ought to be exempted from compliance with ENDA by reason of RFRA. The answer to that question should remain for the courts to decide on a case-by-case basis.

We thank you for the opportunity to be heard on this crucial issue.

Sincerely,

Richard T. Foltin
Legislative Director and Counsel
American Jewish Committee

David A. Harris
Acting Director of Governmental and Public
Affairs
American Jewish Congress

Jess N. Hordes
Washington Representative
Anti-Defamation League

Rev. Timothy A. McElwee
Director
Church of the Brethren Washington Office

Rev. Albert M. Pennybacker
Director
National Council of Churches Washington
Office

Nan Rich
National President
National Council of Jewish Women

Rabbi David Saperstein
Director
Religious Action Center of Reform Judaism
Union of American Hebrew Congregations

Rev. Jay Lintner
Director
United Church of Christ Office for Church
in Society

Dr. Thom White Wolf Fassett
General Secretary
United Methodist Church General Board of
Church and Society

Rev. Meg Riley
Director
Unitarian Universalist Association
Washington Office for Faith and Action

TESTIMONY TO BE SUBMITTED TO THE:
SUBCOMMITTEE ON GOVERNMENT PROGRAMS OF THE HOUSE
COMMITTEE ON SMALL BUSINESS

THE HEARING IS ON HR 1863, THE EMPLOYMENT NON-DISCRIMINATION
ACT OF 1995"

Representative Peter Torkildsen
Chairman,
Government Programs Subcommittee
House Committee on Small Business
B-363 Rayburn House Office Building
Washington, DC 20515

Dear Representative Torkildsen;

My name is Fran Rodgers and I am submitting this testimony in support of HR 1863, the
"Employment Non-discrimination Act of 1995".

I am the founder and CEO of Work/ Family Directions, a Boston based company that
provides a range of services to help managers and employees better deal with personal
issues that make it hard for employees to give their best effort to their jobs. Our mission
is to provide the necessary tools to build a work environment that has high commitment
value. In other words, a place that employees want to "give their all" and feel connected
to their company's business objectives.

The majority of the clients we serve are Fortune 1000 companies, and we have consulted
with many of them on issues around diversity in the work place. After being in business
for over 20 years, I can assure you that diversity in the workplace is the key to a
successful business environment.. It is also a necessity as we move into the 21st century.
American business is competing in a global economy. At a time when the business world
is competing for best talent from the same pool, we cannot afford to close doors by
discriminating against employees who are gay, lesbian, or bi-sexual.

We've learned this lesson before as we struggled against racial discrimination. We have
come a long way since 1964, and we have successfully built upon our achievements. Our
legislation now prohibits discrimination based on race, color, gender, national origin,
religion, age, and disability. Let's not stop the tides of change. Supporting this critical
piece of legislation is a vote for America's economic competitiveness and success. Above
all, it builds on the foundation of the American Dream--that all who have talent and
ambition can participate in our society and economy on an equal basis.

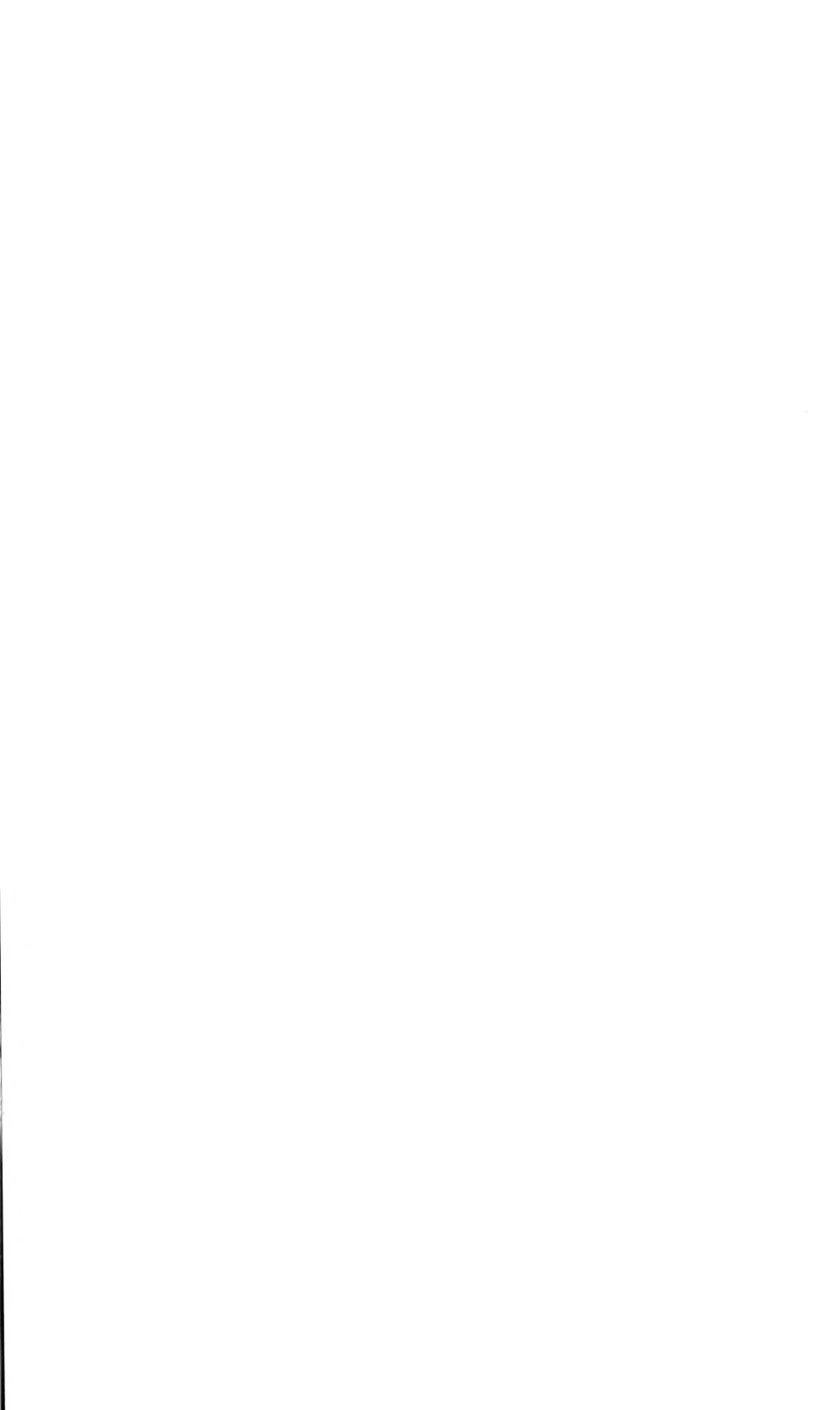
Thank you.

Submitted: July 15, 1996

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